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No. ____

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STEELWORKERS OF AMERICA,
*Petitioner*,

v.

LESLIE RAY COX, *et al.*,
*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in holding, contrary to the rule in the eleven other circuits, that a RICO action under 18 U.S.C. § 1962(c)—which makes it unlawful for "any person" who is "employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity" —may be brought against the "enterprise" itself.

2. Whether the Eleventh Circuit erred in holding that the RICO "pattern of racketeering" requirement may be satisfied through the allegation that a single bribe transaction with a single objective encompassed a series of separate criminal events—the solicitaton of the bribe, the agreement to the bribe, and the payment of the bribe in monthly installments (pension payments) rather than in a lump sum—a holding contrary to the rule in five other circuits that a single transaction with a single objective cannot be made into a "pattern" by dissecting the transaction into a series of discrete criminal acts.

## PARTIES

In addition to the parties listed in the caption, additional plaintiffs in the courts below were R.M. Cox, Larry Driver, Barry Nichols, John Bullard, Robert W. Kennedy, Jr., Lorenzo G. East, Clarence M. Pope, C.R. Altes, Jack E. Merrymon, Terry P. West, R.S. Arnold, M.W. Milstead, J.W. Wade, Manning A.C. Snider, Terry H. Melvin, Thomas E. Hill, Gary D. Swann, Ronald E. Frazier, Anthony J. Crapet, Robert M. Green, Heath L. McMeans, III, Billy Carter, Joe A. Knight, George Boglin, Wardell Clark, Phillip L. Drummond, Don L. Flurry, Dennis R. Fulton, Dennis E. Jones, W.T. Mayberry, James R. Miller, Willie J. Nation, Oscar Lee Perry, Robert Poole, Brack Wells, Willie Young, and Harry S. Turner. The plaintiffs were certified as representatives of a class for damages only. Additional defendants were the Administrator, United States Steel and Carnegie Pension Fund, and USX Corporation.

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner United Steelworkers of America, AFL-CIO-CLC, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Cox, et al. v. Administrator United States Steel & Carnegie Pension Fund, et al.*, 17 F.3d 1386 (Apr. 5, 1994), *as modified,* 30 F.3d 1347 (Aug. 19, 1994).

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 17 F.3d 1386, and is reproduced in Appendix A (1a-71a). The order of the Eleventh Circuit modifying the panel decision, denying in all other respects the petition for rehearing, and denying rehearing *en banc* is reported at 30 F.3d 1347, and is reproduced in Appendix E (162a-166a). The

opinion and order of the United States District Court for the Northern District of Alabama granting in part and denying in part summary judgment is unreported and is reproduced in Appendix B (72a-152a). The opinion and order of the District Court granting in part and denying in part reconsideration of the summary judgment order is unreported and is reproduced in Appendix C (153a-160a). The order of the District Court directing entry of final judgment on the claims at issue is unreported and is reproduced in Appendix D (161a).

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 5, 1994. A timely petition for rehearing was denied on August 19, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The following provisions of the Racketeer Influenced and Corrupt Organizations Act of 1970 are involved:

18 U.S.C. § 1961(3) provides:

> "person" includes any individual or entity capable of holding a legal or beneficial interest in property.

18 U.S.C. § 1961(4) provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(5) provides:

> "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

## STATEMENT OF THE CASE

### A. Introduction

Respondents Leslie Ray Cox, *et al.*, and the class they represent, are present and former employees of defendant USX Corporation ("USX" or "the Company") at the USX Fairfield (Alabama) Works, in a bargaining unit represented by petitioner United Steelworkers of America, AFL-CIO-CLC ("the Union"). Respondents claim that, in order to gain collective bargaining agreement concessions at the Fairfield Works, the Company bribed two employees of the Union by giving them, and four of their close associates, personal pension benefits in exchange for those concessions. Respondents brought suit in the United States District Court for the Northern District of Alabama against both USX and the Union, asserting, *inter alia*, that the Union had violated the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, by virtue of the alleged actions of the two Union employees in seeking and accepting bribes in the form of pension benefits for themselves and their four associates.[1]

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[1] Respondents also sued the United States Steel & Carnegie Pension Fund ("the Fund"), which is the pension fund from

The Union moved for summary judgment on, *inter alia*, the following grounds: (1) the alleged bribe here is a single transaction that does not constitute a "pattern of racketeering activity" under RICO by reason of taking the form of pension benefits that are paid out on a monthly basis or by reason of the demand for the bribe and the agreement to pay the bribe occurring at different times; and (2) as eleven other circuits have held, the controlling RICO prohibition—which makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity" (18 U.S.C. § 1962(c))—imposes liability only on the "person" or "person[s]" who commit the wrongdoing and not on the "enterprise" that employs them (or with which they are associated). The court below ruled against the Union on both grounds. The Union seeks review by this Court of those two holdings.

**B. Statement of Facts**

In September of 1983, as a result of a massive depression in the steel industry, the Fairfield Works had been closed, and its approximately 2,600 employees laid off, for more than a year. USX and the Union began negotiations that month with the objective of reaching an agreement under which the Fairfield Works could be reopened. App. 4a.[2] At the inception of those negotiations, the Company representatives advised the Union that unless agreement were reached on substantial labor cost reductions at the Fairfield Works—which prior to the shutdown had been operating at a large monetary loss to the Company—the Company intended to retain only the new Pipe Mill at Fairfield, to source that mill from its other

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which pensions to retired USX employees are paid. Jurisdiction in the distirct court over the RICO claims was invoked pursuant to 18 U.S.C. § 1964.

[2] References to "App." are to the appendix to this petition for certiorari.

plants, and to permanently shut down the remaining portions of the Fairfield Works. App. 76a. Three months later the Company and the Union agreed to the terms of the Fairfield Agreement, which involved substantial Union concessions from the collective bargaining agreement that had been in effect prior to the shutdown. App. 4a.

Two of the Union's employees, Thermon Phillips and E.B. Rich, negotiated the Fairfield Agreement on behalf of the Union. Phillips was the Director and Rich was the Sub-District Director of District 36 of the Union. Both Rich and Phillips were former USX employees who had left the Company to work for the Union, before accruing enough service to qualify for a Company pension. App. 4a.

Shortly after the Fairfield negotiations began, Rich allegedly raised with the Company the question whether retroactive leaves of absence could be granted to him and to Phillips and certain other Union employees, so that the years they had spent working for the Union would be counted as years spent with USX, and so that they would thereby become eligible for USX pensions. App. 4a, 18a.

On December 24, 1983, after the terms of the Fairfield Agreement had been fully agreed upon, and the Agreement was being typed, Rich and Phillips allegedly stated that they would not sign the agreement until USX gave them an answer on whether they would receive pension credits from USX. According to the testimony upon which respondents and the court below relied, Rich and Phillips signed the agreement only after they were told by a Company representative that while the Company would make no commitment to provide the requested pension credits, the representative was under the impression that the request " 'would be considered favorably.' " App. 5a.

Ten months later, the Company ultimately did grant retroactive leaves of absence, and the resulting pension credits, to Rich and Phillips and to the other four Union

employees Rich and Phillips had named. App. 5a. Upon receiving those credits, Rich and Phillips and the other four were immediately eligible to receive regular monthly pension payments, and they did in fact receive such payments.

**C. Proceedings Below**

The district court granted the Union's motion for summary judgment on the plaintiffs' RICO claims, not on the grounds that are presented here, but on the ground that respondents could not show that they had been injured by the conduct alleged. App. 109a-120a, 141a. The court concluded, based on all the circumstances of the negotiations and the timing of the company's promise to consider the pension request, that " 'the jury could not reasonably infer that USX's promise [to consider the pension request] influenced the negotiators to make concessions in the [Fairfield Agreement].' " App. 18a.

The court of appeals reversed. That court stated that "although there may be no direct evidence that the Union negotiators made concessions to obtain personal pension benefits, there is a great deal of circumstantial evidence that could lead a reasonable jury to that conclusion." App. 19a.

The court of appeals therefore proceeded to consider the Union's two alternative grounds for affirming the summary judgment on the RICO count.

1. The Eleventh Circuit rejected the Union's contention that 18 U.S.C. § 1962(c)—which makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity"—imposes liability only on the "person" or "person[s]" who abuse their position with the enterprise by commiting the specified wrongdoing, and not on the "enterprise" whose affairs were unlawfully conducted by the wrongdoer(s). That court acknowledged that "the law of other circuits" does not allow for such enterprise liability because the

other circuits have adopted "the non-identity rule," under which the "person" who may be held liable under § 1962(c) cannot be the same as the "enterprise" whose affairs are alleged to have been wrongfully conducted. App. 32a.

The court below refused to apply the rule followed in the other circuits, because, in a prior decision, the Eleventh Circuit had "squarely rejected the non-identity rule." App. 32a-33a (citing *United States v. Hartley*, 678 F.2d 961, 989 n.43 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983)). The decision below states: "We, of course, have squarely rejected the non-identity rule, observing that liability for the acts of one's agents 'is simply a reality to be faced by corporate entities.' " App. 32a-33a (quoting *United States v. Hartley*, 678 F.2d at 989 n.43). And the court of appeals added that as a result of its rejection of the non-identity rule, "[t]he narrow exception to vicarious liability recognized by some circuits in order to preserve the non-identity rule is, therefore, inapplicable." *Id.* Accordingly, respondents' RICO claims against the Union were reinstated, including those claims expressly alleging the Union to be the § 1962(c) "enterprise" whose affairs were conducted through a pattern of racketeering activity.

2. The Eleventh Circuit also rejected the contention that the single bribe transaction alleged in this case does not constitute a "pattern of racketeering activity" as is required for liability under RICO. That court held that because the alleged bribe took the form of a pension which was paid in monthly installments over a period of years, and because the alleged racketeering activity included the "ma[king of] the alleged request" and the granting thereof as well as the subsequent payments, the alleged bribe transaction could be viewed as consisting of a series of criminal acts which collectively could be denominated a "pattern." App. 13a-14a.

The Union filed a timely petition for rehearing and rehearing *en banc* on both issues just described—pointing

out with respect to both issues that the position of the Eleventh Circuit is at odds with the position of other circuits. The petition was denied. App. 162a-166a.

## REASONS FOR GRANTING THE WRIT

This case presents two central RICO questions, both of which have generated square conflicts among the circuits.

Section 1962(c) of RICO makes it unlawful for the employees of an "enterprise" to conduct the affairs of that "enterprise" through a pattern of racketeering activity. Every circuit other than the Eleventh Circuit has held that this provision—as its literal language makes clear—is directed at the wrongdoing employees and *not* at the enterprise that the wrongdoing employees misuse. In this case, the Eleventh Circuit, being presented with that otherwise uniform conclusion, rejected the views of every other circuit in holding that the Union can be held liable under 1962(c) for its employees' alleged acceptance of a bribe in exchange for the employees' failure properly to carry out their job responsibilities.

Section 1962(c) also requires proof of a "pattern of racketeering activity." The purpose of the pattern requirement is to limit RICO's application to crimes that "themselves amount to, or that . . . otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (emphasis in original). Since the decision in *H.J. Inc.*, five circuits—the First, Second, Third, Sixth and Seventh Circuits—have held that the pattern requirement cannot be satisfied by breaking up a single transaction with a single objective into its separate component criminal parts. Contrary to the decisions of those circuits, the Eleventh Circuit concluded here that the pattern requirement is met through the allegation of a single bribe transaction with a single objective, because (1) the alleged solicitation of the bribe and the agreement to pay the bribe were separate criminal events occurring at distinct times, and

(2) the bribe was not in the form of a lump sum payment but was in the form of entitlements to pensions, which were paid in regular monthly installments over a period of years.

Violators of RICO § 1962(c) are subject to extraordinary criminal and civil sanctions. Subjecting a legitimate enterprise to these enhanced sanctions because its employee takes personal bribes—or engages in other predicate criminal activity for personal benefit—places those enterprises at heretofore unimagined risk. And, finding that a single, garden variety bribe transaction can be converted into a RICO violation by breaking the transaction into its component parts would make virtually every bribe —and every fraud and other forms of wrongful transactions —a potential RICO violation. That result could only make RICO the cause of action of choice—and the federal courts the fora of choice—for such claims, both criminal and civil. And, we submit, that result is not what Congress intended, what sound law enforcement requires, or what an already overburdened federal judicial system can accommodate.

Given these large stakes, the questions presented here have been heavily litigated. This Court should take this opportunity to resolve the resulting circuit conflicts in the interest of the uniform application of RICO throughout the federal judicial system.

## I. THE NON-IDENTITY ISSUE

Subsection (c) of 18 U.S.C. § 1962 provides in pertinent part: "It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity." [3] In this case, in which the Union's al-

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[3] Subsection (c) of 18 U.S.C. § 1962 provides in full that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate,

leged liability is founded on the bribe-taking of two of the Union's employees, the core RICO claim against the Union alleges that the Union is the "enterprise" whose affairs were wrongfully conducted under subsection (c).[4] Thus, as the court below recognized, App. 27a-33a, this case ultimately turns on the correctness of the so-called "non-identity rule" that a single entity cannot be the § 1962(c) "enterprise" and a § 1962(c) defendant.

Eleven circuits have held that under subsection (c), a claim *cannot* be maintained against the "enterprise"—such as the Union here—that is alleged to have had its affairs "conduct[ed] . . . through" the alleged racketeering activity of "person[s] employed by or associated with" the enterprise.[5] The court below acknowledged that this is the

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directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Subsection (a) of § 1962, which applies where the proceeds of a pattern of racketeering activity are invested in an enterprise, is not a basis for Union liability here, where no proceeds of the alleged racketeering activity were invested in the Union; nor is subsection (b), which applies where control of an enterprise is acquired or maintained through a pattern of racketeering activity. And, although the complaint alleges that the Union—through Rich and Phillips—conspired with the Company to commit a violation of § 1962(c), and thereby violated RICO's conspiracy provision, 18 U.S.C. § 1962(d), "[such a] conspiracy claim suffers from precisely the same infirmity as the section 1962(c) claim, and need not be discussed separately." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 45 n.4 (1st Cir. 1991). *Accord Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993).

[4] See *infra* note 6.

[5] *See, e.g., Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 139-41 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948, 950-51 (D.C. Cir. 1990) (en banc), *cert. denied*, 111 S. Ct. 2839 (1991); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44-45 (1st Cir. 1991); *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 29-34 (1st Cir. 1986); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 314-15 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411-13

prevailing construction of the statute. But the court below rejected that approach because of its earlier decision in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), which had "squarely rejected" the non-identity rule. App. 32a-33a.

*Hartley* was the first decision of any circuit to address the question whether liability under § 1962(c) can extend to the enterprise that is alleged to have been the medium through which "person[s] employed by or associated with" the enterprise have engaged in a pattern of racketeering activity. In the succeeding twelve years, each of the eleven other circuits has considered the issue and has come to the opposite conclusion from that reached in *Hartley*, *see supra* note 5. And that contrary conclusion has been reached after full and thoughtful consideration of *Hartley*. *See, e.g., Schofield v. First Commodity Corp.*, 793 F.2d at 30 ("Only one circuit has

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(3d Cir. 1993); *Glessner v. Kenney*, 952 F.2d 702, 710-14 (3d Cir. 1991); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 300-03 (3d Cir. 1991); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356-62 (3d Cir. 1987); *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *New Beckley Mining Corp. v. United Mine Workers of America*, 18 F.3d 1161, 1163-64 (4th Cir. 1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc); *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989); *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122-23 (5th Cir. 1986) (per curiam); *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1488-89 (6th Cir. 1989); *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 966-68 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306-07 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 399-402 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987); *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in pertinent part*, 710 F.2d 1361, 1364 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1008 (1983); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533-34 (9th Cir. 1992); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1396-98 (9th Cir. 1986); *Board of County Comm'rs of San Juan County v. Liberty Group*, 965 F.2d 879, 885 & n.4 (10th Cir.), *cert. denied*, 113 S. Ct. 329 (1992).

rejected the separate person/enterprise distinction. [Citing *Hartley*].") (1st Cir.); *Bennett v. United States Trust Co. of New York*, 770 F.2d at 315 (expressly rejecting *Hartley*, "we follow the majority view and hold that under section 1962(c) a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity") (2d Cir.); *B.F. Hirsch v. Enright Refining Co.*, 751 F.2d at 633-34 ("Thus, the rationale of the *Hartley* case is significantly undercut. * * * [W]e believe that the majority view best comports with Congressional intent. One of the Congressional purposes in enacting RICO was to prevent the takeover of legitimate businesses by criminals and corrupt organizations. . . . It is in keeping with that Congressional scheme to orient section 1962(c) toward punishing the infiltrating criminals rather than the legitimate corporation which might be the innocent victim of the racketeering activity in some circumstances.") (3d Cir.) (citations omitted); *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d at 1358 ("The contrary rule has been adopted only by the Eleventh Circuit, in *Hartley*.") (3d Cir.); *Bishop v. Corbitt Marine Ways*, 802 F.2d at 123 ("With all deference to our Brethren of the Eleventh Circuit, we align ourselves with the weight of authority: where subsection (c) violations are concerned, the 'person' and the 'enterprise' must be distinct.") (5th Cir.); *Haroco, Inc. v. American Nat'l Bank & Trust of Chicago*, 747 F.2d at 400-02 (analyzing in detail and expressly rejecting the Eleventh Circuit reading of subsection (c) and stating: "As we read subsection (c), the 'enterprise' and the 'person' must be distinct.") (7th Cir.).

The instant case provided the Eleventh Circuit—both the panel that heard the case and the entire court on the petition for rehearing *en banc*—with the opportunity to reconsider *Hartley* in the light of *Hartley's* subsequent rejection by every other circuit. But the opinion below, after canvassing the law of other circuits stated:

> Our review of the law of other circuits . . . reveals that [it is] the non-identity rule . . . [that] protects . . . those employers who are also the RICO enterprises for purposes of § 1962(c). We, of course, have squarely rejected the non-identity rule . . . [citing *Hartley*]. [App. 32a-33a.] [6]

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[6] The court below did state that if the construction of § 1962(c) that has been adopted by the other circuits were applied here, respondents' claims against the Union under that provision would not be completely eliminated, because "[respondents] also allege that the Fairfield Works and the Fund are enterprises as well," and because the construction of § 1962(c) adopted by the other circuits "would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund." App. 33a.

That assertion does not alter the fact that the court below validated respondents' claims in which the Union *is* the alleged affected "enterprise." As to the Union, those are the central RICO claims in this case. And all of respondents' other RICO claims are deficient in other respects. The Fairfield Works or the Fairfield "mill," App. 33a, is merely one *physical facility* operated by USX, and therefore could not be a RICO "enterprise" at all. *See Elliott, supra* note 5, 867 F.2d at 881. As for the Fund, the act that allegedly harmed the plaintiffs—the concessions in the 1983 Fairfield Works Agreement—was not a predicate act through which the affairs *of the Fund* were conducted; thus, plaintiffs could have suffered no injury caused by the alleged RICO violation involving the Fund as an "enterprise." *Cf. Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 384-89 (8th Cir.), *cert. denied*, 113 S. Ct. 2459 (1993).

Moreover, the Eleventh Circuit's reference to these other "enterprises" overlooks that "[a] RICO complaint is not a mix and match game in which plaintiffs may artfully invoke magic words to avoid dismissal." *Glessner, supra* note 5, 952 F.2d at 714. No matter how many ways respondents may label their claims, the underlying allegations remain the same: USX bribed Rich and Phillips with personal benefits for themselves and four associates in order to induce Rich and Phillips improperly to conduct their Union functions. Accordingly, no matter which entity is named as the "enterprise" under subsection (c), the Union's asserted liability turns on whether the Union may properly be held liable under that provision for the alleged bribe-taking by its employees. The analysis adopted by other circuits would not permit the imposition of liability on the Union in such circumstances, because such liability

And, the petition for rehearing *en banc* was denied without opinion.

A clearer and more intractable circuit conflict could not be imagined. As a leading treatise has observed:

> Almost all of the circuits have now construed section 1962(c) to require that the "person" who engages in the pattern of racketeering activity be an entity distinct from the enterprise, at least where the entity is a corporation. Only the Eleventh Circuit has taken a contrary position. Interestingly, it was the first court to decide the issue; the other circuits have all declined to follow its lead.

D. Smith and T. Reed, *Civil RICO*, ¶ 3.07, at 3-67 (1994) (footnotes omitted).[7]

Unless this Court resolves this conflict, the law in the Eleventh Circuit on this important issue will remain contrary to the law in every other circuit. This conflict should not be allowed to persist. Section 1962(c) liabil-

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would be inconsistent with the purpose of the non-identity rule, which is to protect legitimate enterprises from the racketeering activity of their employees—not to subject such enterprises to the destructive sanctions of RICO. *Schofield, supra* note 5, 793 F.2d at 31; *Yellow Bus, supra* note 5, 883 F.2d at 140; *Liquid Air Corp., supra* note 5, 834 F.2d at 1306; *Enright*, 751 F.2d at 633-34.

[7] Nor is the conflict with the other circuits eliminated by the Eleventh Circuit's holding that liability may be applied only if the enterprise has derived some "benefit" from the wrongdoing of its agent. *See* App. 33a-34a. Even accepting the attenuated reasoning under which the court below posited an indirect benefit to the Union from the pensions received by Rich and Phillips and their four associates, App. 36a-37a, the law of the other circuits is that the enterprise whose affairs have been conducted through an agent's pattern of racketeering activity cannot be held liable under subsection (c) "even though it may benefit from its employees' § 1962(c) violations." *Brittingham, supra* note 5, 943 F.2d at 302. *See also Lorenz, supra* note 5, 1 F.3d at 1412-13; *Yellow Bus Lines, supra* note 5, 883 F.2d at 140; *Haroco, supra* note 5, 747 F.2d at 402; *Schreiber, supra* note 5, 806 F.2d at 1397.

ity generates the strongest forms of sanctions—including forfeitures, treble damages, and increased criminal sanctions. That liability provision and those sanctions were crafted by Congress to strike "a mortal blow," 116 Cong. Rec. 602 (1970) (statement of Senator Hruska), against those who misuse the legitimate enterprises which employ them, or with which they are associated, by engaging in a pattern of racketeering activity. The congressional provision for such extreme sanctions against those who violate § 1962(c) is thus premised on the following considerations: Severe criminal and civil sanctions are powerful means to deter and to punish those who would seek to use or who in fact use legitimate organizations as a base for carrying out a pattern of racketeering activity; criminal or civil RICO actions against such "person[s]" are intended to have a protective effect or a cleansing and restorative effect on the legitimate enterprises that those persons would abuse or have abused. So far as we are aware, there is nothing in § 1962(c), or its history, which bespeaks an intent to authorize the striking of "mortal blow[s]" at the misused enterprise itself. And, only in the Eleventh Circuit is that perverse result permitted.

The first issue presented here thus goes to the essence of § 1962(c) of RICO. Is subsection (c) intended as a means of safeguarding or as a means of punishing legitimate enterprises whose affairs are conducted by an employee or a group of employees through a pattern of racketeering activity? That is an issue as to which this Court should resolve the existing circuit conflict.

## II. THE PATTERN ISSUE

RICO does not apply to racketeering activity *simpliciter*. Rather, the statute—and the enhanced criminal penalties and other heightened forms of relief available thereunder, see *supra* at 15—apply only where there is proof of a more aggravated course of wrongdoing than the commission of a predicate crime listed in 18 U.S.C.

§ 1961(1): there must be proof of a "*pattern* of racketeering activity." The term "pattern" thus becomes critical to defining the scope of RICO.

This Court addressed the meaning of that term in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Stating that the term "pattern" is to be given its "commonsense, everyday understanding," 492 U.S. at 241,[8] the Court held that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of *continued* criminal activity." *Id.* at 239 (emphasis by the Court).

Since *H.J. Inc.* was decided, RICO plaintiffs have responded to the decision by claiming that a single criminal transaction can be found to satisfy the "pattern" requirement if the transaction can be dissected into a series of acts each of which is criminal—for example, if a bribe is paid in installments and is preceded by negotiations, or if a mail fraud is accomplished by more than one mailing.

In decisions before and after *H.J. Inc.*, the First, Second, Third, Sixth and Seventh Circuits have rejected such an interpretation of the "pattern" requirement.[9] In this

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[8] *See also* 492 U.S. at 237 (legislative history calls for a "natural and commonsense approach").

[9] With respect to bribery, *see, e.g., Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) ("single instance of bribery" cannot be "distorted" into a pattern of racketeering merely because the bribe "is implemented in several steps and involves a number of acts of communication"); *Clapp v. Greene*, 743 F. Supp. 273, 277, 278 (S.D.N.Y. 1990) (continued payments "will not transform a single alleged bribe into a pattern for RICO purposes"), *aff'd*, 930 F.2d 912 (2d Cir.), *cert. denied*, 112 S. Ct. 197 (1991); *see also* United States Dept. of Justice, *Racketeer Influenced and Corrupt Organizations (RICO); A Manual for Federal Prosecutors* 48 (1985) ("the pattern [allegation] will not be approved if all payments are installments of an agreed-upon overall bribe").

With respect to mail fraud and similar crimes, *see, e.g., Vemco, Inc. v. Camardella*, 23 F.3d 129, 134-35 (6th Cir. 1994) (extensive

case, the Eleventh Circuit adopted the interpretation rejected by those circuits. The decision below holds that the single episode of bribery alleged here can be characterized as a "pattern" because the alleged bribe—a pen-

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fraud and extortion extending over 17 months did not constitute a pattern where those predicate acts were part of a "single criminal episode" with a single goal); *420 East Ohio Ltd. Partnership v. Cocose*, 980 F.2d 1122, 1124-25 (7th Cir. 1992) ("large number" of predicate acts of fraud do not constitute a pattern, because "the number of mailings does not necessarily bear a reliable relationship to the magnitude of [defendant's] racketeering activity"); *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 722-23 (1st Cir. 1992) (series of criminal acts including "a bribe, several false statements, a cover-up, and . . . access to confidential information" did not constitute a pattern because "taken together, they comprise a single effort to obtain (and to keep) one $96 million Defense Department contract"); *Talbot v. Robert Mathews Distrib. Co.*, 961 F.2d 654, 663 (7th Cir. 1992) (conspiracy extending over a period of years involving multiple acts of mail fraud did not constitute a pattern where the acts had a single object and produced a single injury); *Vild v. Visconsi*, 956 F.2d 560, 569 (6th Cir.) (multiple acts of fraud " 'amount at best to a breach of contract with a single customer' "), *cert. denied*, 113 S. Ct. 99 (1992); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 46-47 (1st Cir. 1991) (series of fraudulent billing notices over four years did not create a pattern); *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 820-21 (7th Cir. 1991) (numerous instances of fraud over 18 months did not constitute a pattern where all predicate acts were "predicated on a single transaction"); *Kehr Packages, Inc.. v. Fidelcor, Inc.*, 926 F.2d 1406, 1413-19 (3d Cir. 1991) (fact that numerous acts of mail fraud took place over nineteen months and "might have continued for years" does not create a pattern, where those mailings were incidental to a single episode of fraud and "did not contribute any injury additional to that already inflicted"), *cert. denied*, 501 U.S. 1222 (1991); *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593, 595-97 (3d Cir. 1990) (predicate acts including three extortionate threats, the filing of a fraudulent bankruptcy petition and generation of false publicity do not constitute a pattern "[w]here such a fraudulent scheme inflicts or threatens only a single injury"); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1267-69 (7th Cir. 1990) ("considerable number" of instances of fraud do not create a pattern where they all "relate[] back to the extortion allegedly achieved by [a single] contract," which was "only one dishonest undertaking").

sion—was (like most pensions) paid in monthly installments rather than a lump sum, with each payment representing a distinct criminal act, and because the acts of requesting and agreeing to the pensions constituted separate predicate crimes. App. 13a-14a.

The several circuits that have gone the other way have emphasized that the approach adopted by the Eleventh Circuit reads the "pattern" requirement out of the statute. Those courts have observed that many of the predicate crimes to which RICO applies inherently involve a "pattern" in the sense in which the court below used that term. As the Third Circuit put it in *Marshall-Silver Constr. Co. v. Mendel, supra* note 9, 894 F.2d at 597, "[v]irtually every garden-variety fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and are spread over a period of at least several months. Where such a fraudulent scheme inflicts or threatens only a single injury, we continue to doubt that Congress intended to make . . . availab[le] . . . treble damages and augmented criminal sanctions. . . ." *See also Apparel Act Int'l, Inc. v. Jacobson, supra* note 9, 967 F.2d at 722 ("many individual bank robberies, frauds, drug sales, embezzlements, and other crimes as well would automatically fall within the scope of the RICO statute, a result contrary to RICO's basic purpose").

Thus, on the issue presented here as to the meaning of "pattern," there is a sharp conflict between the Eleventh Circuit on the one hand and the First, Second, Third, Sixth and Seventh Circuits on the other. The issue already has proved to be a frequently recurring one, as the sampling of cases cited *supra* note 9 attests. It is fair to say that no RICO issue has greater practical ramifications. The proper interpretation of the pattern requirement is the critical determinant of whether that statute is a free substitute for the laws setting out the predicate crimes or one confined to a subclass of especially serious and persistent wrongdoing. Certiorari should be granted to resolve the conflict among the circuits on this issue.

## CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari to review the decision of the Eleventh Circuit in this case.

Respectfully submitted,

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Supreme Court, U.S.
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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STEELWORKERS OF AMERICA,
*Petitioner*,

v.

LESLIE RAY COX, *et al.*,
*Respondents*.

**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## APPENDIX A

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

Nos. 91-7215, 92-6218

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LESLIE RAY COX; R.M. COX; LARRY DRIVER; BARRY NICHOLS; JOHN BULLARD; ROBERT W. KENNEDY, JR.; LORENZO G. EAST; CLARENCE M. POPE, JR.; C.R. ALTES; JACK E. MERRYMON; TERRY P. WEST; R.S. ARNOLD; M.W. MILSTEAD; J.W. WADE; MANNING A.C. SNIDER; TERRY H. MELVIN; THOMAS E. HILL; GARY D. SWANN; RONALD E. FRAZIER; ANTHONY J. CRAPET; ROBERT M. GREEN; HEATH L. MCMEANS, III; BILLY CARTER; JOE A. KNIGHT; GEORGE BOGLIN, WARDELL CLARK, PHILLIP L. DRUMMOND, DON L. FLURRY, DENNIS R. FULTON, DENNIS E. JONES, W.T. MAYBERRY, JAMES R. MILLER, WILLIE J. NATION, OSCAR LEE PERRY, ROBERT POOLE, BRACK WELLS, WILLIE YOUNG, HARRY S. TURNER,

*Plaintiffs-Appellees,*
*Cross-Appellants,*

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE and UNITED STEEL & CARNEGIE PENSION FUND,
*Defendants,*

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,
*Defendants-Appellants,*
*Cross-Appellees.*

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LESLIE RAY COX, R.M. COX, LARRY DRIVER, BARRY NICHOLS, JOHN BULLARD, ROBERT W. KENNEDY, JR., LORENZO G. EAST, CLARENCE M. POPE, C.R. ATLES, JACK E. MERRYMON, TERRY P. WEST, R.S. ARNOLD, M.W. MILSTEAD, J.W. WADE, A.C. SNIDER, TERRY H. MELVIN, THOMAS E. HILL, GARY D. SWANN, RONALD E. FRAZIER, ANTHONY J. CRAPET, ROBERT M. GREEN, HEATH L. MCMEANS, III, BILLY CARTER, JOE A. KNIGHT, GEORGE BOGLIN, WARDELL CLARK, PHILLIP L. DRUMMOND, DON L. FLURRY, DENNIS R. FULTON, DENNIS E. JONES, W.T. MAYBERRY, JAMES R. MILLER, WILLIE J. NATION, OSCAR LEE PERRY, ROBERT POOLE, BRACK WELLS, WILLIE YOUNG, HARRY S. TURNER,
*Plaintiffs-Appellants,*

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE, UNITED STATES STEEL & CARNEGIE PENSION FUND, USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,
*Defendants-Appellees.*

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Appeals from the United States District Court
for the Northern District of Alabama

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April 5, 1994

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Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, District Judge.

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* Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

CARNES, Circuit Judge:

This case arises out of the negotiations between the USX Corporation ("USX" or "the Company"), formerly known as United States Steel, and the United Steelworkers of America ('the Union') leading to the 1983 Collective Bargaining Agreement governing operations at the USX steel mill in Fairfield, Alabama ("the Fairfield Works"). The plaintiffs-appellees, who are or were Union members and employees at the Fairfield Works, brought this suit against USX, the administrator of the United States Steel and Carnegie Pension Fund ("the Fund"), and the Union, alleging that the Union negotiators covertly requested and received pension benefits from the Company to which they were not entitled and that, as a result, the Union negotiators agreed to concessions that damaged the plaintiffs. The district court granted summary judgment to the defendants on several of the plaintiffs' claims, and certified its decision for appeal. We review that decision, along with several of the court's rulings on discovery matters.

In part I, we discuss the facts and prior proceedings of the case as background. In part II, we review the district court's grant of summary judgment for the defendants and explain why we reverse that ruling. More specifically, we discuss the standard of review in subpart A, then we analyze the plaintiffs' RICO claim in subpart B and, in subpart C, their breach of contract claim against USX under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185 (1978 & Supp.1993). In part III, we review various rulings of the district court on discovery. After explaining in part IV our lack of jurisdiction to review the district court's decision not to certify a plaintiff class as to the claim for equitable relief, we conclude in part V.

## I. BACKGROUND

The Fairfield Works steel mill in Jefferson County, Alabama, had been closed, and its approximately 2,600 employees laid off, for over a year when, in September 1983, USX and the Union sought to reach an agreement under which the mill could be reopened. William Miller, USX Vice President for Labor Relations, headed the USX negotiating team. The Union was represented by Thermon Phillips, a member of the Union's International Executive Board and Director of District 36 (which includes Alabama) and by E.B. Rich, a sub-director of District 36. Both Phillips and Rich had left USX to work for the Union years before; neither had been with the Company long enough to qualify for a pension.

The plaintiffs allege that shortly after the negotiations began, Rich took Miller aside and gave him a note demanding that the Company grant retroactive leaves of absence to a few specified Union representatives (including themselves), so that the years they had spent working for the Union would be counted for pension purposes as years spent with USX and they would therefore become eligible for USX pensions. According to the plaintiffs, the Union negotiators surreptitiously informed Miller that their agreement to any concessions at Fairfield was conditioned on their receiving Company pensions.

The final Fairfield Works Agreement ("the Agreement" or "FWA"), reached on Christmas Eve, 1983, did include sizable concessions, although the Union argues that USX acceded to numerous Union demands before the Agreement was reached, and USX argues that in return for Union concessions it committed itself to making substantial capital investments to modernize the mill. Under the Agreement, more than 500 jobs were eliminated; local working conditions rules (governing such matters as job assignments and crew sizes) were abolished altogether, giving the Company sole discretion in determining job assignments; all pending complaints, grievances, and

arbitration cases were dismissed; maintenance and janitorial jobs were contracted out; and salary guarantees and certain types of incentive pay were dropped. Towards the end of the negotiations, one USX official estimated that the Agreement would yield savings of 23.5 million dollars per year. The plaintiffs assert that Rich and Phillips refused to sign the final agreement until USX covertly agreed to their pension demands. Miller testified in deposition that the Union negotiators signed the Agreement after he told them that he was under the impression that their pension request "would be considered favorably" but that he "could not assure them of that."

In 1984, after the Agreement went into effect, Rich contacted USX numerous times to inquire about the status of the pension request. In the fall of 1984, the USX Corporate Policy Committee approved a unilateral change in policy to allow approval of indefinite retroactive leaves of absence for former employees who had left to work for the Union. J. Bruce Johnston, Executive Vice President of Employee Relations, proposed the change, writing to the Committee that "it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the [Union]." Shortly thereafter, the Company approved pensions for six of the Union officials that Rich had named during the negotiations (referred to by some as the "Fairfield Six"), including Rich and Phillips themselves.[1] Thus, Rich and Phillips received for themselves and for others that which they had covertly demanded during the negotiations. In November 1984, USX began paying the Fairfield Six their pensions, which were awarded retroactively to February 29 of that year. However, USX did not directly inform the potential beneficiaries, other than the Fairfield Six, of the change in its leave-of-absence policy. In March 1985, Johnston did write a letter to Union

[1] The other members of the Fairfield Six are Ralph Gurley, Carl Statum, Virgil Pearson, and Fred Shepard.

president Lynn Williams, informing him that "United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis." The letter also stated that, "[p]ursuant to the above policy, we have approved requests for Leaves for six (6) International Union Representatives." The Union apparently did not inform any of its other representatives or members of the change in policy, so that the Fairfield Six were the only ones who received pensions under the new policy.

In May 1988, after several other Union representatives heard rumors of the benefits the Fairfield Six were receiving, and applied for similar pensions, the United States Steel Fund sent a letter to the Fairfield Six informing them that it would begin depositing their benefits into escrow accounts. According to the letter, recent decisions by the Second, Third, and Fifth Circuits "raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union officials to receive credit for pension purposes for extended periods they spend in the service of the Union." The letter explained that "in light of current legal developments," continued payment of the benefits could subject the Fairfield Six, USX, and the Fund "to criminal liability."

In 1990, as a result of their actions concerning the negotiations and pensions, USX, Rich, and Phillips were convicted of violating 29 U.S.C.A. § 186 (1978 & Supp. 1993). Subsection (a) of that statute prohibits "any employer" from paying, lending, or delivering "any money or thing of value" to "any representative of any of his employees who are employed in an industry affecting commerce." 29 U.S.C.A. § 186(a)(1) (1978 & Supp. 1993). Subsection (b) makes it "unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money

or other things of value prohibited by subsection (a) of this section." 29 U.S.C.A. § 186(b)(1) (1978 & Supp. 1993). The appeal of those convictions is pending before this Court.

Thirty-eight present and former USX employees brought this suit in the Northern District of Alabama, seeking monetary damages and equitable and declaratory relief for a class of similarly situated workers. The final amended complaint asserted five claims against USX, the Fund, and the Union. Count One alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961 *et seq.* Count Two alleged that the Union breached its duty of fair representation, and that the Company breached its contractural duties, in violation of the Labor Management Relations Act (LMRA) § 301, 29 U.S.C.A. § 185 (a). Count Three alleged that USX and the Union committed an unfair labor practice in violation of the National Labor Relations Act (NLRA), 29 U.S.C.A. §§ 151 *et seq.*, by failing to negotiate in good faith. Count Four alleged that the defendants violated their fiduciary duties under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001 *et seq.*, by failing to notify the plaintiffs or the Department of Labor of the change in the Company's leave policy. Finally, Count Five alleged violations of 29 U.S.C.A. § 186, and sought an order enjoining the defendants from future violations.

The district court certified a plaintiff class, with respect to the damages claim only, of all those who were employed by USX in Jefferson County, Alabama, and represented by District 36 of the Union at any time between July 1, 1983, and August 14, 1990. The court, citing "the substantial conflicts within the class" over the plaintiffs' request that the Agreement be rescinded, declined to certify a plaintiff class with respect to the plaintiffs' claims to equitable relief. During the course of discovery, the plaintiffs deposed Lynn Williams, president of the International Union, and asked him about the

letter he had received from J. Bruce Johnston in March of 1985, informing him of USX's change in the leave-of-absence policy. Williams testified that he made no inquiry upon receiving the letter, but "had some conversation about it" with the Union's attorneys. Plaintiffs' counsel then asked Williams "What did you say and what did they say on that occasion about the March 5, 1985 letter?" The Union's counsel instructed Williams not to answer on the ground that the information sought was protected by the attorney-client privilege. After the plaintiffs moved for an order compelling Williams to respond to the question, the district court determined that the answer was discoverable and, on January 10, 1991, ordered that Williams answer. The court then certified the Union's appeal from that order, and we granted the Union's petition for permission to appeal.

Also during the course of discovery, USX objected to some of the plaintiffs' deposition questions, document requests, and interrogatories, on the ground that the information sought was protected by the attorney-client privilege. When the plaintiffs filed a motion to compel USX to respond, the district court determined that USX, by asserting the defense that it had intended to act in compliance with the law, waived the privilege with respect to those communications bearing on the question of USX's intent in awarding pension credits to Union officials. Accordingly, the court granted the plaintiffs' motions to compel USX to produce materials bearing on USX's knowledge of the legality of its actions. The district court certified USX's appeal from that order, and we granted USX leave to appeal, consolidating the two discovery appeals into one and giving it number 91-7215.

The district court granted the defendants' motion for summary judgment on the plaintiffs' claims under RICO and claims under LMRA § 301 against both USX and the Union, on the ground that the plaintiffs had failed to show that the discussions about pension credits had caused them any injury. The district court dismissed the

unfair labor practice claim on the ground that the National Labor Relations Board has exclusive jurisdiction over such claims. The district court also granted the Union's motion for summary judgment on the plaintiff's ERISA claim against the Union. The district court entered final judgment on those claims as to which summary judgment was granted, with the exception of the claim against the Union for violation of the duty of fair representation under LMRA § 301, which is therefore not before this Court. In appealing that final judgment, the plaintiffs have abandoned the ERISA claim against the Union and NLRA claims. They appeal only the award of summary judgment on the RICO claim and the § 301 claim against USX for breach of contract; they also appeal a number of discovery orders the district court entered prior to summary judgment. That appeal bears number 92-6218, and has been consolidated with the discovery appeal, number 91-7215.

## II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

### A. The Standard of Review

We review a "grant[] of summary judgment de novo, applying the same legal standard applied by the district court in the first instance." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1117 (11th Cir.1993). Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. at 2513 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). In other words, "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir.1989).

The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. at 2553. With regard to issues on which the non-moving party bears the burden of proof, the moving party need not support its motion with evidence "negating the opponent's claim." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir.1993) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir.1991) (*en banc*)). Once the moving party has carried its burden, the non-moving party must show the existence of a genuine issue of material fact to avoid summary judgment. *Id.*

B. The RICO Claim

The civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1964 (c) (1984 & Supp. 1993), provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Thus, to recover on a civil RICO claim, the plaintiffs must prove, first, that § 1962 was violated; second, that they were injured in their business or property; and third, that the

§ 1962 violation caused the injury. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir.1991), *cert. denied*, —— U.S. ——, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992). Those who violate § 1962 are

> those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquired or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962 (b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

*Pelletier v. Zweifel*, 921 F.2d 1465, 1495-96 (11th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991). "Racketeering activity" includes violations of 29 U.S.C.A. § 186, which restricts the payments for which a union representative can ask and which his employer can give. 18 U.S.C.A. § 1961(1)(C) (1984 & Supp.1993); 29 U.S.C.A. § 186 (1978 & Supp.1993).

1. Violation of § 1962

USX argues that the plaintiffs failed to create a genuine issue of material fact about the existence of a violation of § 1962, which is the first element of a civil RICO claim, and the Union has adopted USX's arguments. First, USX argues that the plaintiffs did not proffer sufficient evidence of the existence of a "pattern of racketeering activity." Even as to the allegations, according to the Company, the "[p]laintiffs allege nothing more than a single, uncomplicated episode of alleged wrongdoing in the nature of an alleged 'garden-variety' act of extortion or bribery," and a single act cannot constitute a "pat-

tern." Second, and in the alternative, USX argues that even if the plaintiffs have met their burden of pleading and have proffered sufficient evidence concerning the existence of a pattern of racketeering activity, they have failed to meet their burden with respect to the other elements required under § 1962(a), (b), or (c). We address these two contentions in turn.

a. The Pattern of Racketeering Activity

A "pattern of racketeering activity," for purposes of the RICO Act, "requires at least two acts of racketeering activity," 18 U.S.C.A. § 1961(5) (1984 & Supp. 1993), and the Supreme Court has observed that "two isolated acts of racketeering activity do not constitute a pattern." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985). Instead, " '[i]t is the factor of *continuity plus relationship* which combines to produce a pattern.' " *Id.* (quoting S.Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis added)). More recently, the Court has expanded on the definition of "continuity" and "relationship." Borrowing from Title X of the Organized Crime Control Act of 1970, the Court has explained that predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240, 109 S.Ct. 2893, 2901, 106 L.Ed.2d 195 (1989) (quoting 18 U.S.C. § 3575(e)). As for 'continuity,' the Court explained:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. See *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36, 39 (CA3 1987). It is, in either

> case, centrally a temporal concept—and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. . . .

*Id.* at 241-42, 109 S.Ct. at 2902.

We have held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts," *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir.1986), as long as "each act constitutes a separate violation of the state or federal statute governing the conduct in question," *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir.1985) (internal quotations omitted), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 917 (1986). " 'If distinct statutory violations are found, the predicate acts will be considered to be distinct *irrespective of the circumstances* under which they arose.' " *United States v. Gonzalez*, 921 F.2d 1530, 1545 (11th Cir.1991) (quoting *Bank of America*, 782 F.2d at 971).

As the district court properly recognized, that which USX argues is a single episode of bribery could be viewed by a jury as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity. Each monthly payment of pension benefits to the Fairfield Six could be interpreted as a "thing of value" for purposes of 29 U.S.C.A. § 186, and therefore as a separate predicate act for purposes of RICO. *See, e.g., United States v. Boffa*, 688 F.2d 919, 935-36 (3d Cir.1982) (holding that a reasonable jury could find that each monthly lease payment

made to secure use of an automobile for a union official for four months constituted a separate predicate act under RICO), *cert. denied,* 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983). The jury could easily determine from the proffered evidence that the payments are connected by a common scheme, plan, or motive, and therefore satisfy the relatedness requirement.

USX made payments to the Fairfield Six over a period of three and one-half years (from December 1984 to May 1988). This case is therefore unlike *Aldridge v. Lily-Tulip, Inc.,* 953 F.2d 587 (11th Cir.1992), in which we held that a fraud requiring the use of the mails for six months "was accomplished in too short a period of time . . . to qualify as a pattern of racketeering activity." *Id.* at 593. Furthermore, as the district court observed, a reasonable jury could find that the defendants carried on racketeering activity during the 1983 negotiations, when the Union negotiators made the illegal request, and throughout 1984, when the pensions were established. That period of time is sufficiently long for a reasonable jury to conclude that the plaintiffs estblished closed-ended continuity.

b. The Other Requirements of § 1962

USX argues in the alternative that even if the jury could find that the defendants engaged in a pattern of racketeering activity, the award of summary judgment against the plaintiffs should be upheld because there is no genuine issue of material fact that the additional elements required for criminal liability under the various subsections of § 1962 exist. We disagree.

Under § 1962(c) it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." USX argues that a jury

could not find a violation of that subsection because USX cannot be both the "person" and the "enterprise" contemplated by § 1962(c). In *United States v. Hartley,* 678 F.2d 961, 986 (11th Cir.1982), a panel of this Court held "that a corporation can simultaneously be named as a defendant *and* satisfy the 'enterprise' requirement." (Emphasis added). USX argues that we should reverse that position. That, of course, we cannot do, because "[t]his panel is bound by the decisions of prior panels of the Eleventh Circuit unless overruled by the *en banc* court or the Supreme Court." *Pollgreen v. Morris,* 911 F.2d 527, 534 (11th Cir.1990). Under *Hartley,* a reasonable jury could conclude that the defendants violated § 1962(c); we therefore need not reach the plaintiffs' counter-arguments that the jury could find violations of § 1962(a), (b), or (d), or that the jury could find a violation of § 1962(c), even if *Hartley* is rejected, because the jury could find that the Fairfield Works, or the Union, or District 36 of the Union, or the Fund, was the "enterprise" for RICO purposes.

USX also argues that RICO is unconstitutionally vague. In *United States v. Van Dorn,* 925 F.2d 1331, 1334 n. 2 (11th Cir.1991), this Court found the argument that RICO is unconstitutionally vague to be "completely lacking in merit."

In summary, the plaintiffs have established the first element of a civil RICO claim by producing evidence from which a reasonable jury could conclude that the defendants violated § 1962(c). Thus, the district court correctly declined to grant summary judgment on the first RICO element. We turn now to causation, the second element of a RICO claim, the ground on which the district court did grant summary judgment for the defendants.

2. Causation

In awarding summary judgment to the defendants on the RICO claim, the district court held that the plaintiffs had failed to show the existence of a genuine issue of material fact as to whether the alleged bribery of the Union negotiators caused injury to the plaintiffs. The court reasoned that the plaintiffs had produced no evidence that the alleged bribes caused any of the concessions in the 1983 Fairfield Works Agreement [FWA], and therefore they could not recover:

> Considering [the] evidence in the light most favorable to the plaintiffs, the jury could find the pension issue was the subject of secret discussions several times during the FWA negotiations and that Rich considered the pensions a condition of settlement, but USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign. There is also some evidence from which the jury could infer that USX "committed" to providing the pensions, and that USX intended to influence Rich and Phillips in some manner.
>
> There is no indication or evidence that the negotiators on either side were swayed by their outstanding request for pensions while they negotiated the terms of the agreement. In light of the undisputed evidence that the FWA never changed after USX promised to consider the pension issue, the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA.
>
> More importantly, in view of the additional undisputed evidence that the concessions resulted from the need to make the Fairfield Works profitable before it was reopened, the jury could not soundly infer that it was more likely that the concessions resulted from the bribery of Union officials than from economic necessity. From the evidence plaintiffs

> presented, a jury could only speculate about USX's motives in giving pensions to Union officials. There is no evidence from which the jury could conclude USX obtained the FWA concessions as a result of paying Union officials pensions. Plaintiffs' invitation to assume that the concessions must have been the result of bribery is not sufficient where the concessions could just as likely have resulted from the need to make Fairfield economically viable.

The district court's assertion, that there was substantial evidence that the concessions were caused by adverse economic conditions in the steel industry at the time, apparently refers to the deposition testimony of the negotiators: that the pension question had not influenced the Agreement; that the USX negotiators had said USX could not afford to reopen the plant without concessions; and that the Union negotiators did win a less concessionary agreement than the Company had initially been willing to accept.

We begin our analysis by observing that the plaintiffs need not prove that the matter involving the personal pension benefits caused all of the concessions in the Agreement, or that the prevailing economic conditions had no effect on the negotiations. It is well-established that RICO plaintiffs must prove proximate causation in order to recover. *Holmes v. Securities Investor Protection Corp.*, —— U.S. ——, ——-——, 112 S.Ct. 1311, 1317-18, 117 L.Ed.2d 532 (1992); *see also Reverend Father O'Malley v. Reverend Father O'Neill,* 887 F.2d 1557, 1561 (11th Cir.1989). In other words, "[c]ausation principles generally applicable to tort liability must be considered applicable" in RICO cases. *Brandenburg v. Seidel,* 859 F.2d 1179, 1189 (4th Cir.1988). A proximate cause is not, however, the same thing as a sole cause. Instead, a factor is a proximate cause if it is "a substantial factor in the sequence of responsible causation." *Hecht v. Commerce Clearing House, Inc.,* 897

F.2d 21, 23-24 (2d Cir.1990). It is beside the point whether the depressed condition of the steel industry also contributed to the concessions. *See* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.")

Moreover, there were many different concessions worth varying amounts in the Agreement. The proximate cause question is whether Rich and Phillips' pursuit of the pensions was responsible for changing the amount of any concessions to which the Union agreed, not whether it was responsible for the Union's having to make any concessions in the first place or most of the concessions in the final analysis. For example, if the Agreement cost the Union membership X million dollars in total concessions, but would have cost only X million minus 100,000 dollars in concessions but for the personal pension matter, then that matter caused the membership 100,000 dollars in injury. The district court appears to have recognized as much, noting that "[p]laintiffs' return to work under less favorable conditions constituted an injury to their business or property sufficient to satisfy RICO requirements, if plaintiffs could show they would have returned to work under a less concessionary agreement absent the RICO violations." We agree with that proposition.

To avoid summary judgment, therefore, the plaintiffs must point to evidence from which a reasonable jury could infer that Rich and Phillips' pursuit of pensions for themselves and their friends caused some part of the total dollar amount of concessions in the Fairfield Works Agreement. The district court concluded that "the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA," because any deal on the pensions came after the Agreement

was in final form (although before it was signed). The court seems to have assumed that the plaintiffs must prove that USX's ultimate agreement to provide the pension benefits caused the concessions. However, the mere request for unearned pension benefits constituted a violation of 29 U.S.C.A. § 186(b) and therefore was racketeering activity under 18 U.S.C. § 1961(1)(C). That request, it will be recalled, was first made early in the course of the negotiations. Accordingly, the element of causation is satisfied if the Union negotiators were influenced to make any amount or degree of concessions in the subsequent rounds of negotiations by their desire to convince the Company to agree to their outstanding illegal request coupled with the Company's failure to reject the pension request from the beginning.

Under the federal standard for the sufficiency of evidence, a plaintiff may prove causation by circumstantial evidence. *Porter v. American Optical Corp.*, 641 F.2d 1128, 1142 (5th Cir.1981), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). "Inferences from circumstantial facts may frequently amount to 'full proof' of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary." *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir.1977). Here, although there may be no direct evidence that the Union negotiators made concessions to obtain personal pension benefits, there is a great deal of circumstantial evidence that could lead a reasonable jury to that conclusion. We are particularly reluctant to disregard inferences drawn from circumstantial evidence as to the negotiators' motive. This Circuit is "mindful that 'summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.'" *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir.1985) (quoting *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700,

704, 89 S.Ct. 1391, 1393, 22 L.Ed.2d 658 (1969)), *cert. denied,* 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

In the following paragraphs, we discuss the facts which a reasonable jury could rationally find from the evidence at the time summary judgment was granted, and the evidence from which these facts could be found. Then, we will discuss the cumulative effect of these facts and the conclusions that rationally could be inferred from them. As we said in *Swint v. City of Wadley,* 5 F.3d 1435, 1439 (11th Cir.1993), "what we state as 'facts' in this opinion for purposes of reviewing the rulings on the summary judgment motion[ ] may not be the actual facts. They are, however, the facts for present purposes, and we set them out below."

Gaining the personal pension benefits was of paramount concern to Rich and Phillips in the Fairfield negotiations, and it was a condition of their agreement to any settlement. Emmett Bruce Thrasher, director of another International Union district, testified at the criminal trial that Rich had told him that achieving the pension benefits would be a prerequisite of the Union negotiators' consent to any agreement in the Fairfield negotiations. USX's Vice President for Labor Relations, William Miller, took notes at an October 27, 1983, meeting during the negotiations which also refer to Rich's demand for pension benefits as "a condition of settlement" of any agreement at Fairfield.

Rich and Phillips brought their personal pension demand up more than once, and it was discussed intermittently throughout the negotiation process. Miller testified that Rich first raised the matter after one of the early negotiating sessions by saying "I want this taken care of" while handing Miller a piece of paper on which the demand for pension credit for Fairfield Union officials was written. On December 22, 1983, two days before the end of the negotiations, Miller met in Pittsburgh with

other high-ranking USX officials and listed the pension credits for the Union officials as one of the items still on the table. Miller testified that he reported that, "Mr. Rich and Mr. Phillips had continued to talk about the matter in the context of . . . other corporations and what they were doing." Furthermore, when Miller asked J. Bruce Johnston, USX Executive Vice President for Employee Relations, for instructions on how to respond to Rich and Phillips' ultimatum on the pension question, Johnston responded with a very detailed set of conditions under which USX would agree to the pension request. (Johnston testified that he told Miller not to guarantee anything, but the notes Miller took during the conversation contain no such instruction.) It is permissible to infer that Johnston would not have produced such a detailed list of conditions for the pension benefits if the subject of the pension benefits had been mentioned only once months earlier and then dropped; therefore, the benefits had been discussed several times over the course of the negotiations while the concessions were being hammered out.

The subject of personal pensions for Rich and Phillips was always discussed between them and the USX negotiators in secret. Rich first raised the issue by slipping Miller a handwritten note after a negotiating session. Phllips testified that thereafter, when the USX negotiators discussed the subject, they never did so in the hotel conference room where the formal negotiations were held, but only in a small room across the hall or in the hallway or lobby.

After the concessions were negotiated, Rich and Phillips refused to sign the Agreement until they received assurances that their pension requests would be considered favorably. Miller testified in deposition that Rich and Phillips refused to sign the Fairfield Agreement until they had received an answer to their request for pension credit, and that as far as USX was concerned, "their signatures

were essential." Only after he told them that he thought their pension request "would be considered favorably" did they sign, Miller testified.

The words and actions of USX officials indicate that the Company itself believed that it had made a commitment to provide the pension benefits as part of the Fairfield Works Agreement. Johnston's signature appears on the recommendation for pensions for the Fairfield Six, which states that the "pensions . . . are recommended *in accord with the December 24, 1983 agreement* between the Company and the USW at Fairfield Works." (Emphasis added). According to the original proposal, the pensions were to start on September 1, 1984. A September 25, 1984, letter to Johnston from J.D. Short, USX's Vice President for Employee Benefits, refers to a change in the starting date to February 29, 1984, "as I understand the *commitment* was made that" the pensions would be effective as of March 1. The pension requests submitted by each of the Fairfield Six bear the notation "Per 12-24-83 Agreement." Furthermore, when other Union officials applied for similar pensions, Johnston wrote Union president Lynn Williams that the policy was being cancelled—but that the Fairfield Six would continue to receive their payments. That action and the documents quoted above indicate that USX's supposedly unilateral change in policy was actually the result of a commitment to provide pensions to the Fairfield Six, a commitment given in exchange for concessions from Rich and Phillips.

The defendants tried to keep the existence of the Fairfield Six's pensions secret. In 1986, two years after he had begun receiving his pension, Rich told two other Union representatives that the pension matter had not been resolved in the Fairfield negotiations, so that they need not apply for pensions. There is evidence that Phillips emphatically denied that pension credits were even discussed at the Fairfield negotiations. Although Union president Williams received a letter from USX in 1985 stating that USX had changed its leave-of-absence policy

to allow Union representatives longer leaves of absence "at the discretion of the Company on a case-by-case basis," the Union never approached the Company about granting more such leaves of absence and seems not to have informed any of its representatives of the opportunity. Furthermore, in its answer to a lawsuit filed by Emmett Bruce Thrasher, also a Union representative, the Union denied the allegation that Rich, Phillips, and others had received pensions as part of the Agreement. In another lawsuit brought by William Sommerville, also a Union representative, Union attorney Bernard Kleiman swore in an affidavit that Rich, Phillips, and two others of the Fairfield Six had not retired from USX as of January 30, 1986, although USX records clearly indicate that, for pension purposes, they had retired.

USX, like the Union, told no other Union representative about the change in its pension policy, although a number of other Union representatives would appear to have qualified for it. During the negotiations, Miller asked Schick, USX's General Manager of Labor Relations, to prepare information on the Fairfield Six and to keep the matter confidential. Ed Owens, a USX official at the Fairfield plant, was asked to prepare pension documents for the Fairfield Six and not to "publicize" it; according to USX, those documents have now disappeared.

A jury could find it strange that those who insist that their conduct was proper and their intent pure went to such great lengths to hide it all from the light of day. From such secrecy much may be inferred.

Giving the Fairfield Six the pensions Rich and Phillips demanded during contract negotiations cost the Company a substantial sum of money, and the Company would not have agreed to that private concession without a concession from the Union side in return. Johnston, testifying about a request that International Union president Lynn Williams made during the same period that USX extend pension benefits for workers at another plant, said that

he told Jim Short: "I'm sure not going to voluntarily give away millions of dollars that we might not have to give away in a year in which we are losing money at an awesome rate." He also recalled that "all during '83 and '84 we had a very correct and very tough and very hardnosed arm's length relationship with the Steelworkers." It strains credulity to suggest that a company committed to the profit motive, in a period in which it was in dire financial straits, would in a "very hardnosed arm's length relationship" give away, for nothing in return, unearned pension benefits that cost USX hundreds of thousands of dollars.[2]

Instead of receiving personal pension benefits for themselves and their friends, Rich and Phillips could have demanded and obtained from USX a reduction in the Union's concessions of an amount equal to the cost of the pensions. That conclusion follows as a matter of economics from the nature of the collective bargaining process. There is no reason why a company that would agree to give up a dollar in unlawful pension benefits to union officials would not instead agree to accept one dollar less in concessions from the Union. Indeed, assuming that freedom from the risk of detection and prosecution is worth something to corporations and their officials, it is reasonable to infer that the Company would have been willing to forego more than one dollar in concessions for every dollar it could have avoided paying out in illegal benefits.

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[2] At oral argument, counsel for the Union conceded that the pensions "may well" have been worth hundreds of thousands of dollars. USX's records reveal that the pensions received by the Fairfield Six paid from $888.67 per month to $1,183.25 per month. According to the plaintiffs, the present value of such a pension for Emmett Bruce Thrasher, a Union official who was not included in the Fairfield Six, would have been $88,574.00 in 1987. Whatever their precise value, it is clear that the pensions were worth a substantial amount of money.

In summary, negotiating their personal pensions was of paramount concern to Rich and Phillips, and they considered it to be a condition of settlement. The issue was discussed intermittently throughout the negotiations about concessions, and always in secret. Rich and Phillips refused to sign the negotiated agreement until they received assurances that their pension requests would be considered favorably. The Company and its officials believed that it was committed to pay the pension benefits as part of the Fairfield Works Agreement. All of the defendants tried very hard to keep the pensions secret. The pensions cost the Company a substantial sum of money, and it would not have agreed to them without receiving something in return. Finally, instead of using their position as Union negotiators to gain the pensions for themselves and their friends, Rich and Phillips could have secured a reduction in concessions equal to or greater in value than the pensions. From all of those facts, a reasonable jury could conclude that the pursuit of personal pension benefits by Rich and Phillips, coupled with the Company's failure to reject the idea from the beginning, caused the Agreement to contain more concessions from the Union than it would have contained if Rich and Phillips had been completely loyal to the rank and file Union membership.

The district court observed that "USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign." Because the Agreement's text did not change after USX promised that the request "would be considered favorably," the court concluded that the plaintiffs could not show that the Union negotiators made any concessions to secure their pensions. The district court erred by placing too much reliance upon the timing of the Company's formal promise of the illegitimate pensions. As we have explained above, there was ample evidence that, even without a formal agreement, the combination of illicit behavior by Rich, Phillips, and the Com-

pany caused the amount of the concessions actually negotiated to be more than they would otherwise have been.

Moreover, the district court placed too little weight on the value of the signatures of Rich and Phillips to the negotiated Collective Bargaining Agreement. Even though the agreement had already been negotiated and the concessions agreed upon, Rich and Phillips had something that the Company needed and was willing to trade for—their signatures as the Union's negotiators. USX was willing to trade a promise to grant the pension benefits (saying the requests "would be considered favorably") in exchange for those signatures, and that trade was made. Instead of trading their signatures for personal pension benefits, which the Union concedes "may well" have been worth hundreds of thousands of dollars, Rich and Phillips could have traded their signatures for the benefit of all of the workers whom they represented—refusing to sign until the Company agreed to reduce the amount of concessions granted by the same hundreds of thousands of dollars. Thus, even focusing exclusively upon the conclusion of the collective bargaining process, a rational jury could infer that as a result of their demand for personal pension benefits, the Agreement was more concessionary than it would have been otherwise. The district court should not have granted summary judgment for the defendants on the causation issue.[8]

### 3. Union Liability Under RICO

The Union argues in the alternative that the district court's grant of summary judgment for the Union should

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[8] USX and the Union argue that the grant of summary judgment can be affirmed on the alternative ground that the plaintiffs failed to produce evidence from which the jury could conclude that they were actually injured (as opposed to evidence from which the jury could conclude that the injury was caused by the pension request). However, because a rational jury could infer that the Agreement was more concessionary than it otherwise would have been, the jury could find injury.

be affirmed because the Union is not liable under RICO for the acts of its representatives. The Union argues that because it is the victim of the racketeering activity of its negotiators, it should not be held liable for their violations.

The plaintiffs argue that the Union can be liable under RICO, not only under the principle of *respondeat superior*, but also because "the Union not only learned of its employees' illegal acts and failed to take action, but also willfully participated, conspired, aided and abetted, ratified and actively concealed the illegal acts of Rich and Phillips," while under a fiduciary duty to act in the best interest of its members. They contend that the Union is not a victim; the victims, they maintain, are the "rank-and-file" workers.

We will address in turn the theories that the parties have put forward.

a. Liability of "Victim" Enterprise Under RICO

According to the Union, "Congress did not intend RICO liability to attach to legitimate enterprises that are used as passive instruments for the racketeering activities of employees or others," but instead intended to protect those enterprises. The Union argues that, in response to Congress' intention, "the cases . . . hold that where an individual violates RICO by using an enterprise as the instrumentality of his racketeering activities, liability attaches to the wrongdoing individual, not to the enterprise."

The district court determined that there was no support in the record for the Union's claim that it was a victim. The only injury alleged was the injury to the Union member plaintiffs; the Union produced no evidence that the Union itself had been victimized. The court therefore held that the Union had failed to demonstrate the absence of a genuine issue of material fact, and refused to grant summary judgment on the basis that the

Union was a victim of racketeering activity and therefore could not be held liable for that activity.

However, we need not address the question of whether the Union presented adequate evidence of its victimization, because we reject the Union's argument that "[t]he law in this Circuit is fully consistent with" the cases refusing to hold RICO enterprises liable for the violations of their subordinates. Our review of the cases cited by the Union reveals that although some courts have recognized a narrow exception to vicarious liability under RICO, that exception has been created in order to preserve the non-identity rule (that under § 1962(c), the RICO defendant and the RICO enterprise cannot be one and the same). As discussed in subpart B.1.b, above, this Circuit has unequivocally rejected that rule.

The cases that the Union cites for the proposition that an enterprise is not liable under RICO for the acts of its employees which abuse the enterprise all trace their roots to *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir.1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). In *Haroco*, the Seventh Circuit held that the American National Bank could not be liable under 18 U.S.C. § 1962(c) because that subsection "requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity." *Id.* at 400. The *Haroco* court reasoned that the "non-identity" requirement of § 1962(c) would not allow corrupt corporations to escape all RICO liability, because § 1962(a) contains no such requirement; under that subsection, "the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations." *Id.* at 402. As a result, the "corporation-enterprise" is "liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering." *Id.*

In *Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1306 (7th Cir.1987), *cert. denied,* 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989), "to avoid holding vicariously liable a corporation that was the victim of a RICO violation," the Seventh Circuit held that a corporation will be held vicariously liable for the RICO violations of its employees "only when 1) the corporation has derived some benefit from the RICO violation and 2) imposing vicarious liability is not inconsistent with the intent of Congress." *Id.* (emphasis omitted). Following the reasoning laid out in *Haroco,* the court held that "[v]icarious liability . . . has only limited application to civil RICO." *Id.* The Seventh Circuit has voiced concern "that *respondeat superior* might be used to circumvent § 1962(c)'s requirement that the person conducting the racketeering activities be separate from the enterprise through which those activities are conducted." *Ashland Oil, Inc. v. Arnett,* 875 F.2d 1271, 1281, (7th Cir. 1989). Nonetheless, the Seventh Circuit has approved vicarious liability when holding the employer liable would not violate the non-identity rule: *"Respondeat superior* is . . . entirely appropriate under both subsections (a) and (b)" of § 1962, because those subsections contain no non-identity requirement. *Liquid Air Corp.,* 834 F.2d at 1307. Similarly, *respondeat superior* will make liable under § 1962(c) a corporation whose officers conspire to conduct the affairs of *another* corporation through a pattern of racketeering, because the second corporation then serves as the RICO "enterprise." *Ashland Oil,* 875 F.2d at 1281.

Despite the inclusion of some broad language, the cases cited by the Union stand only for the proposition that, in order to preserve the non-identity rule, vicarious liability should not be imposed under § 1962(c) where the employer is also the RICO enterprise. Thus, although the First Circuit in *Schofield v. First Commodity Corp.,* 793 F.2d 28 (1st Cir.1986), stated broadly that "the concept of vicarious liability is directly at odds with the Congres-

sional intent behind section 1962(c)," *id.* at 32, the actual holding of that case was merely that "section 1962 (c) does not extend liability to the *enterprise*," *id.* at 30 (emphasis added). That was reemphasized in a recent First Circuit opinion which viewed *Schofield* as holding merely that "[s]ection 1962(c) does not recognize corporate liability on the *enterprise*'s part under a theory of *respondeat superior*." *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 45 (1st Cir.1991) (emphasis added). Similarly, the Eighth Circuit declined to apply *respondeat superior* to a corporate defendant for the actions of its chief financial officer, quoting *Schofield:* "Both the language of [§ 1962(c)] and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal 'person' or 'persons.'" *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir.1987).

The D.C. Circuit, in *Yellow Bus Lines, Inc. v. Drivers, Chauffers & Helpers Local Union* 639, 883 F.2d 132, 140 (D.C.Cir.1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C.Cir.1990) (*en banc*), *cert. denied*, —— U.S. ——, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991), adopted *Haroco*'s view of subsections (a) and (c) of § 1962:

> Through section (a), Congress provided for punishment of organizations which in fact gain from their wrongdoing by focusing on profits gleaned from illegal activities, thus "sparing" organizations that do not so profit. Section (c) likewise immunizes organizations which are merely "victims," but this result depends on the requirement of non-identity of person and enterprise which also places some corrupt organizations beyond reach.

Because of its adoption of the *Schofield* court's non-identity rule analysis, the *Yellow Bus Lines* court sided "with those courts that forbid identity of person and enterprise under § 1962(c)." *Id.*

The Third Circuit, in *Petro-Tech, Inc. v. Western Co.*, 824 F.2d 1349 (3d Cir.1987), reviewed a complaint in which Petro-Tech sought to recover from Western on six counts under civil RICO; Western was named as the RICO enterprise in only some of the counts. The Third Circuit held that imposing "respondeat superior and aiding and abetting liability" on a corporate defendant named as the RICO enterprise under § 1962(c) "would disrupt the intended operation of § 1962(c), by making the § 1962(c) enterprise . . . liable." *Id.* at 1359. However, in regard to those counts in which Western was not the § 1962(c) enterprise, "theories of respondeat superior and aiding and abetting liability are not out of place," because the non-identity rule was not involved. *Id.* at 1361-62. The Third Circuit has also held that injunctive relief may be granted against an employer found to be a RICO enterprise, even if damages may not. *United States v. Local 30, United Slate,* 871 F.2d 401, 405 (3d Cir.1989).

The Ninth Circuit recently noted that there is "general agreement that respondeat superior liability is inappropriate under 18 U.S.C. § 1962(c) when the enterprise and person are not distinct." *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149, 1154 (9th Cir.1992). However, reasoning that "[r]espondeat superior and agency liability will encourage employers to monitor more closely the activities of their employees and agents to ensure that these agents are not involved in racketeering activities," *id.* at 1155, the *Brady* court held that "an employer that is benefitted by its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise," *id.* at 1154.

The Sixth Circuit was recently faced with the question whether "ordinary principles of *respondeat superior*" applied to the Mutual Life Insurance Company (MONY), a group of whose employees violated § 1962(c) by sell-

ing fraudulent life insurance policies. *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 380 (6th Cir.1993). The *Davis* court rejected the argument that "as a matter of law, a corporate principal may not be vicariously liable for its agents' actions in violation of section 1962(c)." *Id.* at 378. Finding that the cases declining to apply vicarious liability were "intertwined with the widely-embraced principle that a corporation may not be named as both a defendant 'party' and as the RICO 'enterprise,'" *id.*, the *Davis* court held that those cases are not controlling "where the corporate defendant charged with vicarious liability is *separate from* the RICO 'enterprise.'" *Id.* at 379. Instead, *Davis* held that:

> The rule to be drawn from these cases is that plaintiffs may not use RICO to impose liability vicariously on corporate "enterprises," because to do so would violate the distinctiveness requirement. No such prohibition, however, prevents the imposition of liability vicariously on corporate 'persons' on account of the acts of their agents, particularly where the corporation benefitted by those acts. Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

*Id.* Because the RICO enterprise involved in *Davis* was the association of MONY employees who were engaged in the fraud, the non-identity rule was not threatened, and the court upheld the jury's finding that MONY was liable for the acts of its agents. *See id.* at 377-78.

Our review of the law of other circuits thus reveals that the RICO exception to the application of vicarious liability is a narrow one, created to preserve the non-identity rule, and it therefore protects only those employers who are also the RICO enterprise for purposes of § 1962(c). We, of course, have squarely rejected the

non-identity rule, observing that liability for the acts of one's agents "is simply a reality to be faced by corporate entities. With the advantages of incorporation must come the appendant responsibilities." *United States v. Hartley*, 678 F.2d 961, 989 n. 43 (11th Cir.1982). The narrow exception to vicarious liability recognized by some circuits in order to preserve the non-identity rule is, therefore, inapplicable.

Even if we had adopted the non-identity rule, however, the Union still would not be exempt from liability in this case. Although the plaintiffs have alleged that the Union is a RICO enterprise for purposes of § 1962(c), they also allege that the Fairfield Works and the Fund are enterprises as well. The non-identity rule would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund.

b. *Respondeat Superior* Liability Under RICO

The plaintiffs argue that the Union can be held liable under general agency principles and the *respondeat superior* doctrine. The district court ruled against the plaintiffs on this issue, reasoning that the Union was not liable under agency principles because "the plaintiffs do not claim the Union negotiators, acting with apparent authority, made misrepresentations to them upon which they relied." The plaintiffs argue, correctly, that there is no requirement of reliance for a principal to be liable under RICO for the acts of its agent.

Since the district court entered its order, this Court spelled out the elements of *respondeat superior* liability for RICO violations in *Quick v. People's Bank of Cullman County*, 993 F.2d 793 (11th Cir.1993). Although we have rejected the "non-identity" rule, we have expressed concern that enterprises that are merely victims of the RICO violations perpetrated by their employees should not be held liable for the acts of their employees under *respondeat superior*. In *Quick*, 993 F.2d at 797-98, we

held that *respondeat superior* liability may be applied under § 1962(b) only to those enterprises that derive some benefit from the RICO violation. The *Quick* court also outlined the "general agency principles" to be applied in determining whether a *prima facie* case of vicarious liability under RICO has been made out:

> Under general agency rules, a corporation (principal) will be vicariously responsible for the wrongful acts of its employees (agents) when the acts are: (1) related to and committed within the course of employment; (2) committed in furtherance [of the business] of the corporation; and (3) authorized or subsequently acquiesced in by the corporation.

*Id.* at 797 (quoting *Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1306 (7th Cir.1987) (bracketed material in original), *cert. denied,* 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989)). In *Quick,* we upheld the application of *respondeat superior* to hold a bank liable for the actions of one of its loan officers who, among other misdeeds, demanded deposits and loan payments from borrowers in cash and failed to credit them to the proper accounts. *Id.* at 795. Because the officer's "activities were incident to his assigned duties and took place at the Bank during business hours," we determined that the first element of vicarious liability was satisfied. *Id.* at 797. Because the officer's activities were related to his function of making loans, we determined that the second element was satisfied as well. *Id.* at 797-98. As to the third element, we determined that there was sufficient evidence the bank had acquiesced in the officer's activities because it, among other things, attempted to cover up the misconduct. *Id.* at 798.

In the present case, because the demand for personal pension benefits that Rich and Phillips made was incident to their duties as Union representatives in the Fairfield Works negotiations, a reasonable jury could conclude that their actions were committed in the course of their em-

ployment, so the first *Quick* element is satisfied. Furthermore, because the demand was related to their function of negotiating on behalf of the Union, a reasonable jury could conclude that the second element, that the action be committed in the furtherance of the business of the principal, is also satisfied. Finally, the Union's failure to investigate the allegations against Rich and Phillips or to discipline them until after their convictions, coupled with its attempt to cover up their wrongdoing, could lead a reasonable jury to find that the Union acquiesced in their misdeeds.

A union's failure to act may constitute acquiescence. In *Prater v. United Mine Workers of America,* 793 F.2d 1201 (11th Cir.1986), in which a union had been notified of the violent acts of some of its members, we held that "[b]y failing to take any action to stop the violence, union officials acquiesce[d] in or ratified the illegal activities of the union miners." *Id.* at 1210. Similarly, in *Vulcan Materials Co. v. United Steelworkers of America,* 430 F.2d 446 (5th Cir.1970), *cert. denied,* 401 U.S. 963, 91 S.Ct. 974, 28 L.Ed.2d 247 (1971), in which union members illegally encouraged employees of Vulcan not to report to work, we held that although a union official "may have advised Vulcan employees to return to work, he never took action which could reasonabl[y] have been expected to effectuate this end and thus can be said to have, at the very least, acquiesced in and condoned the illegal activity." *Id.* at 457. In *Local 1814, Int'l. Longshoremen's Ass'n v. NLRB,* 735 F.2d 1384 (D.C.Cir.), *cert. denied,* 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984), two union officials had been convicted of violating the same anti-bribery statute that Rich and Phillips have been convicted of violating. The D.C. Circuit held that "the Union's retention of [the officials] in their high controlling offices, long after the grand jury indictments had put Local 1814 on notice of their misdeeds, is tantamount to acquiescence or condonation of their unlawful acts." *Id.* at 1396. The Court

noted that, "[u]nder such circumstances, one might reasonably have expected a truly upright union to have taken *some* disciplinary action." *Id.*

In the present case, there is no evidence the Union took any disciplinary action against Rich and Phillips, or even made any effort to investigate their actions, until after their criminal convictions. A jury could find that the Union was put on notice of the misdeeds of its negotiators: by Johnston's 1985 letter to Williams, the Union's president, informing him of the decision to change USX policy and to grant leaves of absence to six Union officials; by Johnston's 1987 letter to Williams informing him that the policy was being dropped, but that the six previously granted pension would continue to receive payments; by the allegations in the *Thrasher* and *Sommerville* suits; and by the indictment in the criminal case. A jury could therefore determine that the Union's failure to take any action against two of its negotiators, after being put on notice of their violation of the anti-bribery statute, constitutes acquiescence in their actions.

A reasonable jury could therefore find that the plaintiffs have made out a *prima facie* case of *respondeat superior* liability on the Union's part. The remaining question under *Quick* is whether the Union derived some benefit from the negotiators' RICO violation. In arguing that Rich and Phillips' solicitation of unearned pension credits did benefit the Union, the plaintiffs point to deposition testimony by Union president Lynn Williams, who stated that:

> I believe that every employee of the Union . . . that come[s] from the shops where our members work, ought to be entitled to an indefinite leave of absence so long as they serve the Union, ought to be entitled at whatever time in the future history, so long as they haven't left the Union, to go back to their original place of employment, and I disagree very much with the restrictions . . . which USX has put on that all of these years in the Agreement. . . .

> So, I think that anybody, any representative that can push the leave of absence question past that and enable us to get wedges out there will enable us to move that whole leave of absence question forward, I would think in that instance, that is a good thing.
> . . .

The Union argues that it did not benefit from Rich and Phillips' solicitation of pension credits for the Fairfield Six, because no pension payment was made to the Union. It dismisses the plaintiffs reliance on Williams' comments, contending that Williams was merely discussing recall rights, not pension credits, and that he did not imply that the Union would benefit by trading contract concessions for those rights. Payment to Union officers, the Union argues, "does not establish a benefit to the Union, any more than a bank could be said to benefit from a bribe of a group of its employees."

The Union's argument that it would have benefitted had USX granted recall rights to the negotiators, but did not benefit from the pension rights that were granted, is a distinction without a difference. The question is not whether the Union benefitted in some overall calculation, weighing the concessions made against the value of the pensions received. The question is whether the Union "derived *some* benefit from the RICO violation." *Quick*, 993 F.2d at 797 (emphasis added). Williams' testimony establishes that the Union benefits when one of its representatives is granted a leave of absence to work for the Union. Whether that leave confers recall rights on the employee, or pension benefits, or both, the point is that such benefits make Union representation more attractive, so that the Union has an easier time recruiting workers to serve as representatives. A jury could therefore find that the Union benefitted from the pension benefits given to its negotiators. We therefore must reject the Union's argument that the award of summary judgment can be upheld on the grounds that the Union cannot be liable for the RICO violations of its negotiators.

c. RICO Liability for Violation of Fiduciary Duty

The plaintiffs further argue that the Union is liable for the acts of its representatives because it has a fiduciary duty to the rank and file to monitor the conduct of its representatives and to remedy their illegal actions. The district court rejected that argument, reasoning that even if the Union were liable for failing to take action against Rich and Phillips, that would not make the Union liable for the negotiators' racketeering activity: "[a] breach of fiduciary duty is not, in itself, racketeering activity constituting a predicate act under RICO."

It is true that the duty of fair representation that the Union owes to its members "applies to all union activity, including contract negotiation" and is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 67, 74, 111 S.Ct. 1127, 1130, 1134, 113 L.Ed.2d 51 (1991). The Union may therefore be liable for approving of, acquiescing in, or concealing a breach of trust committed by one of its employees (although we do not reach that question here). *See Restatement (Second) of Trusts*, § 224(2)(c). As we discuss below, the existence of the fiduciary duty may also be relevant to determining the Union's liability for aiding and abetting the RICO violations of its negotiators. However, as the district court properly held, violating a fiduciary duty is not racketeering activity under 18 U.S.C. § 1961(1), and cannot lead to RICO liability on the Union's part. The district court correctly rejected the plaintiff's fiduciary duty theory of liability.

d. Liability for Ratification of Agent's RICO Violations

The plaintiffs argue that the Union is liable for Rich's and Phillips' RICO violations because its failure to investigate or discipline the two and its efforts to conceal the pensions they received constitute ratification of their ac-

tions. The Union contends that it cannot be liable for the acts of its negotiators because it did not ratify their acts with "full knowledge" of the bribery scheme. The district court appears to have agreed with the Union's position. The court reasoned that the letters from Johnston, and the allegations in the *Thrasher* and *Sommerville* cases, were insufficient to give the Union knowledge that its negotiators had broken the law. Distinguishing between allegations and violations, the district court said "[t]he Union's knowledge of . . . allegations of section 186 violations by Union negotiators is not the same as knowledge of section 186 violations by Union negotiators." Without evidence that the Union knew the truth of the allegations, the district court reasoned that the plaintiffs could not support their claim that the Union ratified Rich and Phillips' actions.

"A principal can ratify the unauthorized act of an agent purportedly done on behalf of the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." *McDonald v. Hamilton Electric, Inc.*, 666 F.2d 509, 514 (11th Cir.), *cert. denied*, 459 U.S. 879, 103 S.Ct. 175, 74 L.Ed.2d 144 (1982). The district court's reasoning would seem to require the plaintiffs to produce direct evidence that the Union leadership was aware that Rich and Phillips had in fact engaged in prohibited conduct. However, "proof of authorization of ratification can be based upon circumstantial evidence." *James R. Snyder Co. v. Edward Rose & Sons, Inc.*, 546 F.2d 206, 209 (6th Cir.1976). A reasonable jury could infer that the Union's failure to act, after having been placed on notice of the negotiators' betrayal by the allegations, constituted ratification of their misconduct.

In *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 136 (D.C.Cir.1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C.Cir.1990) (*en banc*), *cert. denied*, —— U.S. ——, 111 S.Ct. 2839, 115 L.Ed.2d

1007 (1991), a Union president received a letter from the president of a bus company which contained allegations that Union members had committed violent acts; there was no evidence "to indicate that the union took action to investigate the allegations or to curb any excesses" of the strikers. The D.C. Circuit held that from the Union's "apparent lack of concern with the violence brought to its attention, the jury plausibly could conclude that the [Union] 'knowingly tolerated' this state of affairs. No more is required to support a finding of ratification." *Id.*

The situation in this case is similar to that in *Yellow Bus Lines*, and we find the reasoning of that case to be persuasive. Union president Williams testified that he thought it would be "a good thing" for Union representatives to "push the leave of absence question forward;" Williams received a letter from Johnston informing him of the change in USX policy and that six Union representatives had been given pensions; the *Thrasher* and *Sommerville* suits were filed, alleging that Rich and Phillips had received pensions out of the Fairfield negotiations, and Rich and Phillips were indicted for receiving the bribes. In spite of all that, the Union took no action. From the Union's failure to act, a reasonable jury could conclude that the Union "knowingly tolerated" the situation, and thereby ratified it. The same failure to take action that constitutes acquiescence for purposes of *respondeat superior* liability (as we concluded above in subpart II.B.3.b) is also sufficient to constitute ratification. *Prater v. United Mine Workers of America*, 793 F.2d 1201, 1210 (11th Cir.1986).

e. Aiding and Abetting Liability Under RICO

The plaintiffs argue that the Union is liable under RICO for aiding and abetting the RICO violations that Rich and Phillips committed, either because it failed to take any action against them or because it affirmatively

covered up their misdeeds. The district court held that the Union could not be liable for aiding and abetting the actions of its representatives by virtue of " 'mere negative acquiescence,' " but instead, "there must be evidence that the Union committed an overt act designed to aide in the success of the venture." The court considered the actions taken by the Union in the *Thrasher* and *Sommerville* suits: denying the allegation that Rich, Phillips and others received pensions as a result of the Fairfield Works Agreement; and filing an affidavit by Union attorney Bernard Kleiman, denying that Rich and Phillips were retired from USX, when in fact they had retired and were receiving pensions. It held that these actions could constitute concealment subjecting the Union to liability if the responsible Union officials knew the truth about the pensions. Accordingly, the district court denied the Union's motion for summary judgment on the aiding and abetting claim, although the denial appears to be without prejudice to a renewal of the motion at the close of discovery.

One who aids and abets two predicate acts can be civilly liable under RICO. *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1356 (3d Cir. 1987). To establish civil liability for aiding and abetting, the plaintiffs must show: (1) that the defendant was generally aware of the defendant's role as part of an overall improper activity at the time that he provides the assistance; and (2) that the defendant knowingly and substantially assisted the principal violation. *See Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir.1988), *cert. denied*, 490 U.S. 1091, 109 S.Ct. 2433, 104 L.Ed.2d 989 (1989); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir.1975); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C.Cir.1983). The defendant's "[k]nowledge may be shown by circumstantial evidence, or by reckless conduct." *Woodward*, 522 F.2d at 96. The same evidence that would support a jury's finding that the Union "knowingly tolerated" Rich and Phillips'

actions pursuant to the plaintiffs' ratification theory (the letter from Johnston, the allegations in the *Thrasher* and *Sommerville* suits, and the criminal indictment) will also support a jury's finding that the Union was aware of its general role in the scheme.

As we have already concluded in our discussion of causation in subpart II.B.2, above, the jury could infer that the Union took steps to conceal the unearned pensions that USX awarded to the Union's negotiators. Whether those steps constitute substantial assistance is a question for the jury. The district court was therefore correct in denying the Union's motion for summary judgment on the plaintiffs' aiding and abetting claim.

f. Co-Conspirator's Liability Under RICO

The plaintiffs' final argument for Union liability is that the Union violated 18 U.S.C. § 1962(d), which makes it a crime "for any person to conspire to violate any of the" other RICO provisions. (As we discussed in part II.B, above, anyone "injured in his business or property by reason of a violation of § 1962" may recover treble damages.) To be adjudged liable, "each defendant in a RICO conspiracy case must have joined knowingly in the scheme and been involved himself, directly or indirectly, in the commission of at least two predicate offenses." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 41 (1st Cir.1991). Proof of an agreement is "the essence of conspiracy." *United States v. Bright*, 630 F.2d 804, 813 (5th Cir.1980). "Thus, a defendant may wittingly aid a criminal act and be liable as an aider and abettor, but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act." *Id.* (citations omitted). However, "[t]he existence of the conspiracy agreement does not have to be proven by direct evidence. Instead, it can be inferred from " 'the conduct of the alleged participants or from circumstantial evidence of the scheme.' " *United States v. LeQuire*, 943 F.2d 1554, 1562 (11th Cir.1991) (quot-

ing *United States v. Ard*, 731 F.2d 718, 724 (11th Cir. 1984)), *cert. denied*, —— U.S. ——, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992). As the district court properly noted, evidence that a defendant assisted in the concealment of a conspiracy may support an inference that the defendant joined in it while it was still in operation. *United States v. Gold*, 743 F.2d 800, 825 (11th Cir. 1984) (quoting *United States v. Freeman*, 498 F.2d 569, 576 (2d Cir.1974)), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985).

The district court reasoned that, if the plaintiffs were able to show that the Union concealed the racketeering activity of its representatives, a "jury could reasonably infer that the Union joined in while the conspiracy was still in operation," and the Union would therefore be liable. We agree. Because a jury could infer that the Union took steps to conceal Rich's and Phillips' RICO violations, a jury should decide whether the Union is liable for conspiring with them.

g. Summary of Holdings on Union Liability

We agree with the district court that the Union cannot be liable for its representatives' RICO violations under the theory that it violated a fiduciary duty to its members. However, the plaintiffs are entitled to go to trial on their claims that the Union is liable for Rich's and Phillips' RICO violations under *respondeat superior*, ratification, aiding and abetting, and conspiracy theories. We therefore reject the Union's argument that the award of summary judgment must be upheld because it cannot be liable under RICO.

## C. THE § 301 CLAIM AGAINST USX

The plaintiffs contend that the district court erred in entering summary judgment against them on their "hybrid" claim against USX for breach of contract under § 301 of the Labor Management Relations Act, 29 U.S.C.

§ 185. As the Supreme Court explained in *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 163-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983),

> an individual employee may bring suit against his employer for breach of a collective-bargaining agreement. Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. . . . [H]owever, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation. . . . The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both.

(internal citations and quotation omitted). The plaintiffs argue that,

> [b]ecause the [Fairfield Works] Agreement is void and unenforceable, USX breached its contractual obligations when USX did not pay members of plaintiff class the full compensation which they should have been paid (from 1984 to date) based on the 1983 Basic Labor Agreement, the 1987 Basic Labor Agreement, and prior practices, without regard to the [Fairfield Works] Agreement.

(The Basic Labor Agreement, between USX and the International, governs all of USX's plants in Canada and

the United States, in the absence of local agreements.) The district court rejected the claim on the same ground on which it rejected the RICO claim—that "the court can find no evidence of record from which a jury could conclude that the concessions in the FWA were given in exchange for the pensions." Having decided that a jury could infer that the Fairfield Works Agreement is more concessionary than it would have been had the Union negotiators not solicited and received unearned pension benefits (in subpart II.B.2, above), we cannot agree with the district court's reasoning or affirm its order granting summary judgment on that basis.

USX argues that we should affirm the grant of summary judgment on the alternative ground—which the district court rejected—that the plaintiffs' § 301 claim was not timely brought. In *DelCostello,* the Supreme Court held that the 6-month statute of limitations from § 10(b) of the National Labor Relations Act should be applied to § 301 suits. 462 U.S. at 169, 103 S.Ct. at 2293. The district court, applying a discovery rule, held that the suit was timely brought, because the defendants were unable to show that the plaintiffs should have uncovered adequate grounds for filing suit prior to six months before the suit was actually filed in December 1988. On appeal, USX argues that our decision in *Hill v. Texaco, Inc.,* 825 F.2d 333 (11th Cir.1987), precludes the application of a discovery rule to actions brought pursuant to a § 10(b) statute of limitations period. In that case, we observed that principles of equitable tolling "cannot be applied in the face of contrary congressional intent." *Id.* at 334. According to USX, because § 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge," it would be contrary to Congressional intent to apply equitable tolling principles to a § 301 suit. However, we have already held that the discovery rule applies to claims under § 301: "Generally, a cause of action accrues under § 301, and the statute

of limitations begins to run, *when in the exercise of reasonable diligence the claimant knew or should have known of the injury.*" *Hill v. Georgia Power Co.*, 786 F.2d 1071, 1074-75 (11th Cir.1986) (emphasis added); *see also Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423, 427 n. 3 (11th Cir.1993). We are, of course, bound by these prior decisions. The district court's refusal to grant summary judgment on the ground of timeliness was therefore entirely correct.

USX also argues that summary judgment is proper on the alternative ground that the plaintiffs' § 301 claim is meritless, because "operations in accordance with consensual modifications" to the Basic Labor Agreement cannot be a breach of contract. In USX's view, the plaintiffs' claim is one against the Union for breach of the duty of fair representation in signing a bad contract, not against the Company: "where, as here, the duty of fair representation claim is based upon a breach of duty in negotiating a labor agreement, no § 301 employer contract breach is implicated at all." However, the plaintiffs do not allege merely that Rich and Phillips negotiated a bad faith deal, and we have already concluded that a reasonable jury could infer that USX took advantage of Rich's and Phillips' willingness to pursue personal gain by signing a more concessionary Fairfield Works Agreement than they otherwise would have. And, "[o]f course, a bargain by which a fiduciary takes advantage of his position to profit at the expense of the beneficiary is fraudulent and is voidable by the beneficiary." 6A Arthur Corbin, *Corbin on Contracts*, § 1456, at 534 (1962). Rich and Phillips were fiduciaries of the rank-and-file union membership; the Supreme Court has held that the "duty of fair representation" a Union owes to its members "is . . . akin to the duty owed by other fiduciaries to their beneficiaries." *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1991). The Agreement is therefore voidable.

That does not mean, however, that the plaintiffs are entitled to recover the difference between what they were paid under the Fairfield Works Agreement and what they would have been paid under the Basic Labor Agreement. Upon rescinding a voidable contract, the plaintiffs are entitled "to the reasonable value of a performance rendered" to the Company. 6A Corbin, § 1535, at 822. "Reasonable value" is determined by the marketplace, free of illegitimate taint. It is clear that the rates provided for in the Basic Labor Agreement are not the reasonable market value the plaintiffs would have received for their labors, because it is undisputed that USX had shut down the facility rather than pay those rates. Instead, the proper measure of the value of the work done is the value that the parties would have agreed upon had the Union negotiators not violated their fiduciary duty. In other words, if a jury finds that the contract was voidable, the plaintiffs are entitled to recover the value of the concessions that the Union negotiators would have extracted from the company if the negotiators had not been pursuing their personal pension benefits.

## III. THE ISSUES RELATING TO DISCOVERY

The Union and USX both appeal from orders of the district court rejecting their invocation of the attorney-client privilege during discovery. In the interlocutory appeal and in the appeal of summary judgment on the RICO claim, the plaintiffs complain of limits the district court has placed on their discovery efforts. The areas of discovery affected by the limits may be grouped into four categories: USX pension practices at other plants; grand jury materials; attorney work-product; and limiting the deposition of USX and Union attorneys to written interrogatories.

The Union argues that the plaintiffs failed properly to raise the issues in the district court. According to the Union, the plaintiffs should not be allowed to appeal the limitations on their discovery efforts because the plain-

tiffs failed to request further discovery into the four areas in either of its Rule 56(f) motions.[4] (The plaintiffs did request further discovery of the attorney-client communications and we discuss those requests below.) However, we cannot agree that the plaintiffs should have included the issues in their Rule 56(f) motions. As the plaintiffs' observe, it would not make sense to require them to request "deferral of the summary judgment motions until plaintiffs could complete discovery which the district court already denied." Having raised the issues below, and having appealed from the entry of final judgment, the plaintiffs are entitled to raise the issues on appeal.

A. Standard of Review

To the extent that the appeals involve mixed questions of law and fact, regarding the applicability of the attorney-client privilege to particular communications that the plaintiffs wish to discover, our review is plenary. *In re Grand Jury Matter No. 91-01386,* 969 F.2d 995, 997 (11th Cir. 1992); *In re Grand Jury Proceedings 88-9 (MIA),* 899 F.2d 1039, 1042 (11th Cir.1990). Otherwise, matters of discovery and evidence are committed to the discretion of the district court. *Wu v. Thomas,* 996 F.2d 271, 275 (11th Cir.1993); *Lee v. Etowah*

[4] When the plaintiffs first raised this issue in the interlocutory appeal, the Union filed a motion, which was carried with the case, to dismiss the plaintiffs' cross-appeal for want of jurisdiction. The Union's argument was that, because the district court denied the plaintiffs' motion for certification of those parts of the order dealing with rulings adverse to the plaintiffs, they should be considered to be different orders for purposes of the interlocutory appeal. The Union's motion was made moot, however, when the plaintiffs raised the same issues in their appeal from the district court's entry of final judgment on the RICO and § 301 claims. "[W]hen reviewing an appeal from a final judgment, this court can review rulings on previous interlocutory orders." *Jones v. Preuit & Mauldin,* 808 F.2d 1435, 1438 n. 1 (11th Cir.1987) (citing *Aaro, Inc. v. Daewoo Int'l (America) Corp.,* 755 F.2d 1398, 1400 (11th Cir.1985)). The Union's motion to dismiss the cross-appeal is therefore denied.

*County Bd. of Educ.*, 963 F.2d 1416, 1420 (11th Cir. 1992). Discovery orders should not be overturned "unless the district court has abused its discretion and such abuse has resulted in substantial harm to the party seeking relief." *Arabian American Oil Co. v. Scrafone*, 939 F.2d 1472, 1477 (11th Cir.1991).

B. The Union's Attorney-Client Privilege

The district court determined that the Union could not assert the attorney-client privilege against the plaintiffs to prevent them from discovering the content of Union President Williams' discussion with the Union's attorneys regarding USX's change in its leave of absence policy. Although the court rejected the plaintiffs' argument that the crime-fraud exception to the attorney-client privilege applies, it accepted their argument that the *Garner* doctrine prevents the Union from invoking the privilege against the plaintiffs, to whom, as members, the Union owes a fiduciary duty.

According to Federal Rule of Evidence 501, "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law," *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981)), protects the disclosures that a client makes to his attorney, in confidence, for the purpose of securing legal advice or assistance. *In re Grand Jury (G.J. No. 87-03-A)*, 845 F.2d 896, 897 (11th Cir.1988). Based on the theory that "sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client," the privilege is designed "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and ad-

ministration of justice." *Upjohn,* 449 U.S. at 389, 101 S.Ct. at 682. Despite its value in encouraging clients to confide in their counsel, we have recognized that, as " 'an obstacle to the investigation of the truth,' " the privilege is not without exceptions. *Garner v. Wolfinbarger,* 430 F.2d 1093, 1101 (5th Cir.1970) (quoting 8 Wigmore, *Evidence,* § 2291, at 554), *cert. denied,* 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971).

1. The *Garner* Doctrine

The *Garner* court determined that shareholders suing their corporation may discover communications otherwise protected by the attorney-client privilege upon a showing of good cause. The *Garner* court observed that "management does not manage for itself and that the beneficiaries of its action are the stockholders." *Id.* at 1101. It is, therefore, "difficult to rationally defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into the attorney's communications with corporate representatives who have only nominal ownership interests, or even none at all." *Id.* However, *Garner* recognized that "the complete removal of the attorney-client privilege from the grasp of the corporation client . . . would expose corporations to harassment suits by minority stockholders and a possible deterioration of candid attorney-client communication and effective corporate management." *Cohen v. Uniroyal, Inc.,* 80 F.D.R. 480, 483 (E.D.Pa.1978). *Garner* therefore does not eliminate the privilege altogether "merely because those demanding information enjoy the status of stockholders." *Garner,* 430 F.2d at 1103. Rather, stockholders are given the opportunity "to show cause why [the privilege] should not be invoked in the particular instance." *Id.* at 1104. The *Garner* panel listed nine factors to be considered in determining whether good cause has been shown:

> [1] the number of shareholders [seeking discovery] and the percentage of stock they represent; [2] the

> bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

*Id.*

The plaintiffs argue that the *Garner* doctrine applies to a union's assertion of the attorney-client privilege against its members. *See Nellis v. Air Line Pilots Ass'n,* 144 F.R.D. 68, 71 (E.D.Va.1992) (holding that the *Garner* doctrine applies because unions owe a fiduciary duty to their members under *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 74, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1991)); *Aguinaga v. John Morrell & Co.,* 112 F.R.D. 671, 681 (D.Kan.1986) (holding that the *Garner* doctrine applies to unions because "union officials' association with their members possesses all the essential characteristics of a fiduciary relationship"); *Boswell v. International Bhd. of Elec. Workers Local 164,* 106 L.R.R.M. (BNA) 2713, 1981 WL 27188 (D.N.J.1981) (applying *Garner* to suit brought by union member against union). The Union urges that we adopt the Ninth Circuit's reading of *Garner* in *Weil v. Investment/Indicators Research and Management, Inc.,* 647 F.2d 18, 23 (9th Cir.1981), that "*Garner*'s holding and policy rationale simply do not apply" outside the context of the shareholder derivative suit. Alternatively, the Union argues that the plaintiffs

have failed to show good cause, because they are a small percentage of the Union's membership, seeking damages from the Union for themselves, and have shown no need to know what legal advice Williams received.

The district court determined that the *Garner* doctrine should apply to the Union, because *Garner* was premised "on the view that corporate management owed fiduciary duties to the stockholders of the corporation," and because "the relationship between union and union members" likewise "has fiduciary overtones." The court then determined that the plaintiffs had shown good cause, because "the plaintiff class here is a significant percentage of the total Union membership," and "the plaintiffs' suit advances the general membership's interest in providing a check on the Union's proper discharge of its fiduciary duties to the members." The court also noted that the plaintiffs' claim was colorable, that they had identified the specific communication that they wished to discover, that no trade secret is involved, and that there is no other source "from which plaintiffs might gain the same information."

Because we hold that even if the *Garner* doctrine applies, it does not support an exception to the attorney-client privilege under the facts of this case, we need not decide whether the *Garner* doctrine does apply to disputes between a union and its members. We do note that the Fifth Circuit has firmly rejected "the Ninth Circuit's narrow interpretation of the types of suits covered by *Garner*." *Ward v. Succession of Freeman*, 854 F.2d 780, 786 (5th Cir.1988) (citing *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1239 n. 1 (5th Cir.1982)), *cert. denied*, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989). However, in applying *Garner* to suits brought by shareholders seeking to recover for themselves at the corporation's expense, the Fifth Circuit:

> recognize[d] reason in the *Weil* holding: Where shareholders bring a successful derivative action on

> behalf of the corporation, they benefit *all* shareholders. Where, however, shareholders seek to recover damages from the corporation for themselves, they do not even seek a gain for all others. In the latter circumstance, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny, in determining if good cause for suspending the privilege exists.

*Id.* at 786. After applying that "careful scrutiny," the *Ward* court determined that the plaintiffs had failed to show good cause; one of the reasons given was that the "[p]laintiffs cumulatively owned less than four [percent] of the stock in LA Coke." *Id.*

Even assuming the *Gardner* doctrine applies to unions, on the facts of this case discovery of the attorney-client communications should not be allowed. Although many of the factors listed in *Garner* appear to support the plaintiffs' argument that there is good cause for discovery, two factors foreclose it: the fact that only a tiny percentage of the defendant Union's members are members of the plaintiff class; and the fact that the interest of the plaintiff class is adverse to those who are not in the class. *Compare Ward,* 854 F.2d at 786 (fact that plaintiffs owned less than four percent of stock weighs against finding of good cause) *with Fausek v. White,* 965 F.2d 126, 133 (6th Cir.) (fact that plaintiffs own 40% of corporation's stock weighs for finding good cause), *cert. denied,* —— U.S. ——, 113 S.Ct. 814, 121 L.Ed.2d 686 (1992). *Garner* recognized that, in a shareholder derivative suit, which the plaintiffs bring on behalf of the corporation, "it is difficult to rationally defend the assertion of the privilege if *all, or substantially all,* stockholders desire to inquire into the attorney's communications with corporate representatives." 430 F.2d at 1101 (emphasis added). This case, however, is unlike the shareholder derivative suit in *Garner,* because the plaintiff class in this case consists of only about one-half of one percent of the international union's membership. The plaintiffs

argue that the district court's assertion that the plaintiff class represents "a significant percentage of the total Union membership" can be defended on the ground that the class "represents practically one hundred percent of the USX employees at [the Fairfield] Works who are covered by the [Fairfield] Agreement." The problem with that reasoning is that the lawsuit was not filed against the local union that represents only Fairfield workers; it was filed against the international union. Moreover, the attorney-client communication in question was not to an officer of the local union but to an officer of the international union. Therefore, the proper measure of significance for the plaintiff class is in terms of the national union, whose membership is so large that it dwarfs the size of the plaintiff class.

This case is also unlike the shareholder derivative suit in *Garner,* and is unlike the shareholders' suit against a chief executive officer in *Fausek,* because there is no identity of interests between the plaintiffs and the non-plaintiff Union members. Instead, their interests are adverse. The plaintiffs in the present case seek damages not on behalf of the Union, but for their personal benefit at the expense of the Union and its other members. Their interests are directly adverse to those of the other Union members. *Garner* noted that "[d]ue regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege." *Id.* at 1101 n. 17. Where such a small fraction of the Union's membership seeks to pierce the attorney-client privilege at the expense of the remaining ninety-nine and one-half percent, "due regard" for the interest of the non-party members requires that the plaintiffs' request be rejected.

2. The Crime-Fraud Exception

The plaintiffs argue in the alternative that the district court's order compelling Williams' testimony can be upheld under the crime-fraud exception to the attorney-client privilege, because "the Union by its counsel" subsequently

made numerous false statements about the pension status of its negotiators, as part of an effort to conceal their illegal actions. The district court rejected this argument because "there is no evidence showing the communication furthered any crime or fraud, or . . . was connected with any crime or fraud."

To determine whether the crime-fraud exception applies, we employ a two-part test laid out *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (11th Cir. 1987):

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

*Accord, In re Federal Grand Jury Proceedings, 89-10 (MIA),* 938 F.2d 1578, 1581 (11th Cir.1991).

While the plaintiffs' evidence on the existence of Union cover-up may satisfy the first prong of the test, we agree with the district court that they have failed to satisfy the second. The purpose of the second prong is to identify "communications that should not be privileged because they were used to further a crime or a fraud." *Schroeder,* 842 F.2d at 1227. Although that determination "must take into account that the [party seeking discovery] does not know precisely what the material will reveal or how useful it will be," *id.,* "[t]here is no reason to permit opponents of the privilege to engage in groundless fishing expeditions," *U.S. v. Zolin,* 491 U.S. 554, 571, 109 S.Ct. 2619, 2630, 105 L.Ed.2d 469 (1989).

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the

> judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.
>
> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.

*Id.* at 572, 109 S.Ct. at 2631 (internal citations and quotation omitted). The plaintiffs have failed to produce any evidence that William's communications with the Union's attorneys regarding the Johnston letter furthered or were closely related to an effort on the Union's part to conceal the illegal actions of its negotiators. They have therefore failed to show that the district court abused its discretion in refusing to permit even an *in camera* review of the communications involved.

3. Waiver

Finally, the plaintiffs argue that the Union waived the attorney-client privilege by allowing counsel Kleiman to testify in the criminal trial, and by filing Kleiman's affidavits in lawsuits brought by Union representatives who did not receive pensions. At the criminal trial, Kleiman testified about the receipt of the letter from Johnston, and what he did in response; Kleiman did not testify as to the conversation he had with Williams about the letter. The district court reasoned that the Union did not waive the privilege because Kleiman did not disclose any confidential communications.

The attorney-client privilege "belongs solely to the client," and the client may waive it, either expressly or by implication. *In re Von Bulow,* 828 F.2d 94, 100, 101 (2d Cir. 1987). We have observed that the doctrine of waiver by implication reflects the position that the attorney-client privilege " 'was intended as a shield, not

a sword.'" *GAB Business Services, Inc. v. Syndicate 627,* 809 F.2d 755, 762 (11th Cir.1987) (applying Florida law) (quoting *Pitney-Bowes, Inc. v. Mestre,* 86 F.R.D. 444, 446 (S.D.Fla.1980)). In other words, "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." *United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.), *cert. denied,* —— U.S. ——, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991); *accord United States v. Jones,* 696 F.2d 1069, 1072 (4th Cir. 1982) ("Selective disclosure for tactical purposes waives the privilege.").

The plaintiffs' position appears to be that, having allowed Kleiman to testify about the Johnston letter and the pension status of the Union's negotiators, the Union impliedly waived the privilege as to Williams's communications with Kleiman on the subject. There is support for that position in the version of the implied waiver rule suggested in Wigmore's treatise: "[t]he client's offer of his *own testimony* as to *specific facts* about which he has happened to communicate with the attorney is not a waiver . . . . But his offer of the *attorney's testimony* as to such specific facts *is* a waiver," and "a waiver at a *first trial* should suffice as a waiver for a later trial." 8 Wigmore, Evidence § 2298, at 638, 639 (McNaughton rev. 1961) (penultimate emphasis added). Wigmore bases the distinction between the client offering testimony on a subject, and the attorney doing the same, on his view that "the attorney ought in general not to be used as a witness." *Id.* at 637.

However, Wigmore's broad version of the rule goes beyond the considerations of fairness that have motivated the application of the rule; courts generally have not found a waiver where the party attacking the privilege has not been prejudiced:

> The great weight of authority holds that the attorney-client privilege is waived when a litigant places in-

> formation protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information *would be manifestly unfair* to the opposing party.

*Conkling v. Turner,* 883 F.2d 431, 434 (5th Cir.1989) (emphasis added) (internal quotation omitted); *see also United States v. Aronoff,* 466 F.Supp. 855, 863 (S.D. N.Y.1979) (finding no waiver where party attacking privilege alleges no prejudice); *Goldman, Sachs & Co. v. Blondis,* 412 F.Supp. 286, 288 (N.D.Ill.1976) (observing that "it is a uniform rule that when a party's conduct reaches a certain point of disclosure, *fairness* requires that the privilege cease" (emphasis added)); *Wender v. United States Automobile Ass'n,* 434 A.2d 1372, 1374-75 (D.C.1981) (basing waiver analysis on considerations of fairness); *State v. Von Bulow,* 475 A.2d 995, 1007 (R.I.) (citing *Aronoff* and basing implied waiver analysis on considerations of fairness), *cert. denied,* 469 U.S. 875, 105 S.Ct. 233, 83 L.Ed.2d 162 (1984). In *Sedco Int'l S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.), *cert. denied,* 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982), the Eighth Circuit observed that "[c]ourts have found waiver by implication" in three sets of circumstances: "[(1)] when a client testifies concerning portions of the attorney-client communication, [(2)] when a client places the attorney-client relationship directly at issue, and [(3)] when a client asserts reliance on an attorney's advice as an element of a claim or defense." (Internal citations omitted). As a district court in our Circuit has observed:

> "[a]ll of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information

would have been manifestly unfair to the opposing party."

*Pitney-Bowes, Inc. v. Mestre,* 86 F.R.D. 444, 447 (S.D. Fla.1980) (quoting *Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D.Wash.1975)).

Because the plaintiffs have failed to explain how they have been prejudiced by any of the actions taken by the Union's lawyers in the criminal case, we decline to find that the Union has impliedly waived its privilege. *See Remington Arms Co. v. Liberty Mutual Ins. Co.,* 142 F.R.D. 408, 415 (D.Del.1992) (holding that the "Court cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant").

Because the attorney-client privilege is not rendered inapplicable by the *Garner* doctrine or the crime-fraud exception, and because it was not waived, the ruling of the district court granting the plaintiff's motion to compel William's testimony is therefore reversed.

C. USX'S Attorney-Client Privilege

In the proceedings before the district court, USX has consistently taken the position that "[a]t the time the revised leave-of-absence policy was implemented in October, 1984, . . . USX believed the policy to be lawful." Memorandum of USX Corporation and United States Steel and Carnegie Pension Fund In Support of Their Motion To Dismiss, April 3, 1989, at 5; *see also* Pretrial Order at 5. Although USX has denied any intent to assert a defense of advice of counsel or to rely on any privileged attorney-client communications in its defense, the district court observed that "USX's defense . . . necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change." Reasoning that "it

would be inequitable to allow USX to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law," the district court held that USX waived the attorney-client privilege with regard to such communications.

USX argues that it was the plaintiffs who injected the issue of USX's "state of mind" into the case by including allegations of intentional, criminal wrongdoing in their complaint. Because 29 U.S.C. § 186, the criminal statute that the plaintiffs claim USX violated, contains a component of "willfulness," USX argues that it has merely denied the plaintiffs' allegations, and that a mere denial of *mens rea* should not constitute waiver of the attorney-client privilege.

As we discussed in the previous section, the attorney-client privilege " 'was intended as a shield, not a sword.' " *GAB Business Services, Incv. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir.1987) (quoting *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D.Fla.1980)). USX waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications. *Id.* In *Conkling v. Turner*, 883 F.2d 431, 434-35 (5th Cir. 1989), the plaintiff claimed that the RICO statute of limitations period was tolled because he did not know that a statement made by the defendants was false until told by his attorney 18 years after the fact. The Fifth Circuit held that by doing so, he waived the privilege as to communications from his attorney about the statement; "the attorney-client privilege is waived when a litigant 'place[s] information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.' " *Id.* at 434 (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975))

(alteration in original). *See also Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir.1987) ("To waive the attorney-client privilege . . . a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case."); *Sedco Int'l S.A. v. Cory*, 683 F.2d 1201, 1206 (8th Cir.) ("[B]y asserting fraud, [the defendant] . . . waived his right to assert the privilege to prevent disclosure of communications which might have proven he did not rely on [the plaintiffs'] statements."), *cert. denied*, 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982). The defendant need not raise an affirmative defense to inject a new issue into the case, although it frequently occurs that way. *Cf. Lorenz*, 815 F.2d at 1098 (stating that new issues are "[m]ost often" injected "through the use of an affirmative defense").

*United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991), although a criminal case, is instructive. Prior to his trial for securities fraud, Bilzerian announced his intention to testify that he believed in good faith that certain disclosures he made to the Securities and Exchange Commission were legal. The district court ruled that if he were to do so, he would waive the attorney-client privilege with respect to those communications with his counsel regarding the legality of his actions. Bilzerian therefore declined to assert his good faith belief. He was convicted, and he challenged the conviction, arguing that the district court had prevented him from denying criminal intent—an essential element of the crime with which he was charged. The Second Circuit rejected his argument, reasoning that:

> Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been

> directly relevant in determining the extent of his knowledge and, as a result, his intent.

*Id.* The court held that Bilzerian had not been deprived of the right to deny criminal intent; he "was free to deny criminal intent . . . without asserting good faith." *Id.* at 1293.

Similarly, in the present case, USX could have denied criminal intent without affirmatively asserting that it believed that its change in pension fund policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege.

The district court ordered the disclosure of those attorney-client communications bearing on USX's knowledge of the law relating to its leave of obsence policy, from the date Rich and Phillips first proposed the payments to May 22, 1988 (the date the Company ceased making direct payments to the Fairfield Six). USX argues that because the Company admits it was not certain of the plan's legality after the Third Circuit's 1986 decision in *Trailways Lines, Inc. v. Trailways, Inc.*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932, 107 S.Ct. 403, 93 L.Ed.2d 356 (1986), the waiver should only apply to communications made before that date. We cannot say, however, that the district court abused its discretion in determining that the communications USX had with its attorneys, after *Trailways* and prior to its decision to cease making direct payments, might bear on what USX knew about the legality of the plan, and when USX knew it. Accordingly, the order of the district court is affirmed.

## D. Plaintiffs' Attempt to Obtain Discovery of Pension Practices at Other Plants

### 1. The Parton Matter

The district court granted the defendants' motion for a protective order preventing the plaintiffs from deposing twelve people to inquire about Jack Parton, a Union negotiator at USX's Gary, Indiana, plant. According to the plaintiffs, Parton was granted a series of one-year leaves of absence beyond USX's two-year limit, so that he too earned pension credit at USX while working for the Union, and thus discovery should be allowed so they can show that his case is part of USX's pattern of RICO violations.

The district court determined that it could "find no relationship and no substantial similarity between the Parton matter and the incidents at the Fairfield Works that are the subject of this lawsuit." We disagree. The plaintiffs have produced evidence showing that the manager of employee relations at the Gary Works promised, in the final hours of negotiations on local issues there, to "take care of" Parton should he be reelected to his position within the Union. Internal USX memoranda reveal that Johnston initially refused to agree to the request; however, on November 18, 1983 (the month before he agreed that Rich and Phillips' request would be considered favorably), Miller granted Parton an extension on his leave of absence. While the district court retains the power to grant a protective order when the information sought in a deposition clearly would be irrelevant, *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir.1979), "relevance is broadly defined in the context of discovery," *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir.1982). The Parton matter is plainly relevant to plaintiffs' efforts to establish a pattern of RICO violations. The order of the district court is therefore reversed.[6] The district court does retain its

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[6] The plaintiffs have filed a motion to supplement the record on appeal to provide this Court with a more complete record on which

authority to keep discovery about the Parton matter within reasonable bounds.

2. Negotiations at Other Plants

The district court also denied the plaintiffs' request that the defendants produce virtually all documents relating to USX business plans for negotiations with the Union at other USX facilities from 1980 to the present. The plaintiffs argue that such an inquiry is necessary so that they can address the defendants' contention that the concessions in the Fairfield agreement were the result of economic necessity rather than the bribes. The district court found that the request was unduly burdensome, particularly given the fact that "[a]greements at other plants present uncontrollable variables resulting from differences in size, location, equipment, productivity, and other unknowable factors, which makes the collective bargaining process unique to each plant. A comparison of the bargaining results between plants is, therefore, the proverbial comparison of apples and oranges." USX characterizes the plaintiffs' request as an overwhelmingly burdensome fishing expedition, and objects on the ground that the documents requested contain business secrets.

"Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied." *Avirgan v. Hull,* 932 F.2d 1572, 1580 (11th Cir.1991). By any measure, the plaintiffs have had a significant amount of discovery in this case. The plaintiffs were allowed discovery of those of USX's business plans that were related to the Fairfield Works; they have taken 36 depositions and have received

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to evaluate the defendants' arguments. Although we have the "inherent equitable power[]" to supplement the record on appeal, *Jones v. White,* 992 F.2d 1548, 1566 (11th Cir.1993), the materials offered are not necessary for us to decide this issue, and we therefore decline to exercise that power. The motion is denied.

over 50,000 documents from USX alone. Limitations on the scope of discovery are "appropriate when discovery would burden the party from whom it is sought unduly, in comparison with any advantage it would provide to the discovering party . . . because a particular matter is of only minor importance." Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure:* § 2040, at 286 (1970). We have already held, in subpart II.B.2 above, that the plaintiffs do not need to show that the prevailing economic conditions had no effect on the negotiations. The substantial burden that the requested discovery would have on the defendants therefore far outweighs any benefits plaintiffs would gain by being able to present a comparison of the results of the Fairfield negotiations to those at other plants. The district court's order denying that discovery was not an abuse of discretion, and it is affirmed.

E. The Grand Jury Materials

The district court also denied the plaintiffs' motion to compel production of testimony and documents presented to the grand jury in the criminal case. The plaintiffs argue that because the defendants have in their possession a copy of all of the documents and transcripts of all of the testimony presented to the grand jury, and the defendants' witnesses have been uncooperative, they need access to the materials. The plaintiffs also argue that the defendants' interest in preserving the secrecy of the material is minimal, given that the criminal trial is over.

In the proceedings of November 28, 1990, the district court emphasized that its denial of the plaintiffs' motion "does not preclude [the plaintiffs] from renewing the motion with a specific showing of need. . . . I didn't feel that you made the particularized showing on any of those grand jury proceedings in order to" compel discovery. It has long been the law of this Circuit

> that disclosure of grand jury testimony is properly granted where there is a compelling need for such disclosure and such disclosure is required by the ends of justice. *Disclosure even in these circumstances must be closely confined to the limited portions of the testimony for which there is found to be a particularized need.*

*Allis-Chalmers Mfg. Co. v. City of Fort Pierce*, 323 F.2d 233, 242 (5th Cir.1963) (emphasis added). The plaintiffs have made no effort to identify those portions of the grand jury transcripts for which they have a particularized need. Given the opportunity to renew the motion upon a showing of such need, the plaintiffs are unable to demonstrate that the court's order "resulted in substantial harm" warranting a determination that the court abused its discretion. *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1477 (11th Cir.1991). The district court did not abuse its discretion, and its order is affirmed.

F. Attorney Work Product

The plaintiffs moved to compel discovery of one document produced by USX attorneys concerning the leave of absence policy, and several documents produced by Union attorneys, relating to statements made by the Fairfield Six or by Emmett Bruce Thrasher that relate to matters in the litigation. They also moved to compel an answer to an interrogatory asking the Union to identify each statement taken by its attorneys during their investigation into requests by Union officials for USX pensions. The district court denied the motions and sanctioned the plaintiffs for bringing them; the plaintiffs appeal that order.

The attorney work-product privilege traces its roots to the recognition by the Supreme Court, in *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947), that "it is essential that a lawyer work with a certain degree of privacy, free from unneces-

sary intrusion by opposing parties and their counsel." The privilege is presently codified in Fed.R.Civ.P. 26(b)(3), which provides, in part:

> (3) Trial Preparation: Materials. . . . [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Material that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, is referred to as "opinion work product." *In re Murphy,* 560 F.2d 326, 336 (8th Cir.1977); *cf. Hickman,* 329 U.S. at 511, 67 S.Ct. at 393; *Upjohn Co. v. United States,* 449 U.S. 383, 399, 101 S.Ct. 677, 687, 66 L.Ed.2d 584 (1981). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman,* 329 U.S. at 510, 67 S.Ct. at 393. In *Upjohn,* the Supreme Court made clear that an attorney's notes and memorandum of a witness's oral statements is considered to be opinion work product. *Upjohn,* 449 U.S. 383, 399-400, 101 S.Ct. 677, 687-88, 66 L.Ed.2d 584 (1981). As Rule 26(b)(3) makes apparent, "opinion work product can not be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate

means without undue hardship." *Murphy*, 560 F.2d at 336; *see also National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 983 (4th Cir.1992); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C.Cir.1982). Instead, "opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Murphy*, 560 F.2d at 336.

The crime-fraud exception presents one of the rare and extraordinary circumstances in which opinion work product is discoverable. The exception applies to work-product in the same way that it applies to the attorney-client privilege. *In re International Sys. & controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir.1982); *see also In re Antitrust Grand Jury*, 805 F.2d 155, 164 (6th Cir. 1986); *Sealed Case*, 676 F.2d at 812; *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir.1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 803 (3d Cir.1979). Before the crime-fraud exception will be invoked, the plaintiffs must satisfy the two-part test of *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir.1987), which we discussed in subpart III.B, above. *See also In re Federal Grand Jury Proceedings 89-10 (MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991). Even if the Union engaged in an effort to conceal the unlawful activities of its negotiators, as a jury might find (see subpart II.B.2, above), after our own *in camera* inspection, we agree with the district court that the documents in question were not created to further any crime or fraud; nor are they closely related to any.

The remaining two grounds on which the plaintiffs argue for reversal are not among the very rare and extraordinary circumstances in which opinion work product is discoverable. First, the plaintiffs argue that USX waived the privilege by asserting that it thought its actions were legal, and the Union waived the privilege by allowing one of its attorneys, Kleiman, to testify at the criminal trial and by asserting that it was unaware of Rich and Phillips' actions. The subject-matter waiver doctrine pro-

vides that a party who injects into the case an issue that in fairness requires an examination of communications otherwise protected by the attorney-client privilege loses that privilege. *GAB Business Services, Inc. v. Syndicate 627,* 809 F.2d 755, 762 (11th Cir.1987). However, as the Fourth Circuit has observed in *In re Martin Marietta Corp.,* 856 F.2d 619, 625-26 (4th Cir.1988), *cert. denied,* 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989), the subject-matter waiver doctrine does not extend to materials protected by the opinion work product privilege. The *Martin Marietta* court's reasoning was that the plain language of Fed.R.Civ.P. 26(b)(3) suggests that opinion work product should not be subject to such an implied waiver, and that the rationale behind the doctrine (the fear that a party might " 'make affirmative testimonial use' " of a communication and then seek to shield it from disclosure) does not apply to mental impressions and legal theories. *Id.* at 626 (quoting *Duplan Corp. v. Deering Milliken, Inc.,* 540 F.2d 1215, 1223 (4th Cir. 1976)). We agree. Where a party asserts that he believed his actions to be lawful, he waives the attorney-client privilege as to what his attorney told him about the legality of his actions (see subpart III.C, above); his attorney's work product, however, is a different matter.

The plaintiffs also argue that the *Garner* doctrine applies to work product. *Garner v. Wolfinbarger,* 430 F.2d 1093, 1103-04 (5th Cir.1970), *cert. denied,* 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), held that shareholders suing their corporation may discover communications otherwise protected by the attorney-client privilege upon a showing of good cause. The plaintiffs seek to extend that holding to apply to the relationship between the workers at the Fairfield plant and their Union and their pension fund, as well as to the work product privilege. However, the Fifth Circuit has held that the *Garner* doctrine does not apply to attorney work product. *In re International Sys. & Controls Corp.,* 693 F.2d 1235, 1239 (5th Cir. 1982) (footnotes omitted). We agree.

Furthermore, at least as far as the Union is concerned, we have already held, in III.B above, that the *Garner* exception is not justified on the facts of this case. The district court therefore did not abuse its discretion, and its order is affirmed.

G. Rule 31 Deposition of Attorneys

The final discovery order that the plaintiffs appeal is the *sua sponte* ruling of the district court, pursuant to Rule 31, that the plaintiffs may depose the defendants' attorneys only by written questions. The plaintiffs argue that they should be allowed to take oral depositions, citing the hostility of the witnesses and the defendants' efforts at concealment. The district court reasoned that, "[i]n view of the plaintiffs' continuing efforts to breach the defendants' attorney-client privilege, the court is convinced that these depositions, in the absence of firm control by the court, will almost certainly be attended by continuing disputes and may require that they be supervised by a judicial officer." That order was not an abuse of discretion, and we affirm it.

## IV. CLASS CERTIFICATION

The district court declined to certify the plaintiff class for the plaintiffs' claims for equitable relief, and the plaintiffs seek to appeal. Because the plaintiffs seek rescission of the current Fairfield Works Agreement, the district court determined that the conflict between those members of the class who have been recalled to work under that agreement and those that have not made certification inappropriate. Because we do not have jurisdiction over the appeal, we do not reach the plaintiffs' arguments for reversal.

The decision of a district court denying class certification "does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim. Such an order is appealable, therefore,

only if it comes within an appropriate exception to the final-judgment rule." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). The plaintiffs having shown no applicable exception to the final judgment rule, we dismiss their appeal without expressing any view on the merits. *See Gonzalez v. Texas Employment Comm'n*, 563 F.2d 776, 777 (5th Cir.1977) (dismissing appeal when "appellant, upon whom the burden to show jurisdiction rests, has not demonstrated the applicability of any of the exceptions to" the rule that denials of class certification are not immediately appealable) (internal citation omitted).

## V. CONCLUSION

We REVERSE the district court's grant of summary judgment on the plaintiff's RICO claim against USX and the Union, as well as the court's grant of summary judgment on the plaintiffs' § 301 claim against USX for breach of contract. We also REVERSE the decision of the district court granting the defendants a protective order preventing plaintiffs from taking depositions to inquire into the Parton matter. Finally, we REVERSE the district court's decision that the *Garner* doctrine prevents the Union from asserting the attorney-client privilege against the plaintiffs. In all other respects, we AFFIRM, with the exception of the district court's denial of class certification as to the plaintiff's equitable and declaratory relief, which we have no jurisdiction to review.

## APPENDIX B

[Filed Dec. 16, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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CV-88-N-2069-S

LESLIE RAY COX, *et al.*,

*Plaintiffs,*

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; USX CORPORATION, a/k/a U.S. STEEL CORPORATION; and THE UNITED STATES STEEL & CARNEGIE PENSION FUND,

*Defendants.*

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## MEMORANDUM OF OPINION

### I. Introduction.

This is a civil action brought by a class of plaintiffs who are present and former employees of defendant USX Corporation ("USX" or "the Company") in Jefferson County Alabama and who were represented by the United Steelworkers of America, AFL-CIO-CLC ("the Union") at any time from July 1, 1983 to the present.[1] The plaintiffs accuse the Company, the Union and United States Steel & Carnegie Pension Fund ("the Fund"). of wrongdoing in connection with the negotiation and implementation of the December 1983 Fairfield Works Agreement ("the FWA") between USX and the Union. More specifically, plaintiffs claim that in response to demands of

[1] The class was certified with respect to damages claims only.

certain Union negotiators, the Company agreed to amend its leave of absence policy for Union officials in such a way as to make those negotiators eligible for Company pensions to be paid by the Fund. The plaintiffs charge the defendants with: (1) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (Count I); (2) breach of the Union's duty of fair representation, and breach of contract by the Company, 29 U.S.C. § 185(a) (Count II); (3) violations of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d) (Count III); (4) breach of Employee Retirement Income Security Act ("ERISA") fiduciary duties, 29 U.S.C. § 1132 *et seq.* (Count IV); and (5) violations of 29 U.S.C. § 186 (Count V).

In Count I of their amended complaint, plaintiffs allege USX engaged in "racketeering activity" by giving the Union negotiators a "thing of value" in violation of section 302 of the Taft-Hartley Act, 29 U.S.C. § 186. Plaintiffs claim USX, with income from a pattern of the alleged racketeering activity, invested in, acquired or controlled, and conducted the affairs of the Fairfield Works,[2] the Fund, the Union and District 36 of the Union. The Union and the Fund allegedly conspired with the Company and with the Union negotiators to violate the provisions of 18 U.S.C. § 1962, in violation of 18 U.S.C. § 1962(d). Plaintiffs allege they were injured in their business or property because concessions in the Fairfield Works Agreement resulted in reduced compensation and fewer jobs.

In Count II of their amended complaint, plaintiffs sue USX for breach of contract and the Union for breach of its duty of fair representation, a so-called "hybrid § 301"

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[2] Prior to 1964, U.S. Steel's operations in Fairfield were separately incorporated as the Tennessee Coal & Iron & Railway Company. PA 262c. In 1964, the Company reorganized and all the subsidiaries, like Tennessee Coal & Iron, ceased to operate as subsidiaries and became just steel plants within the organization. PA 262b-262c.

claim brought under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).[3] Plaintiffs claim USX breached the 1983 and 1987 Basic Labor Agreements by operating the Fairfield Works pursuant to the Fairfield Works Agreement. Plaintiffs claim the Union breached its duty of fair representation by the negotiators' request for and acceptance of long term leaves of absence in return for making concessions to the Company.

In Count III of their amended complaint, plaintiffs claim the Union and USX committed an unfair labor practice in violation of 29 U.S.C. § 158(d) by failing to negotiate in good faith during the FWA negotiations.

In Count IV of their amended complaint, the plaintiffs claim the defendants violated the ERISA by failing to notify them or the Department of Labor of the amendment to the Company's Leave of Absence policy. Plaintiffs claim this failure was a breach of USX's and the Fund's fiduciary duties under ERISA. Plaintiffs also claim USX and the Fund breached their fiduciary duties by making wrongful payments from the Fund to the Union officials.

In Count V, plaintiffs seek an order enjoining defendants from committing violations of 29 U.S.C. § 186 in the future.

The action is now before the court on defendants' motions for summary judgment as to all counts of the plaintiffs' amended complaint. The motions have been fully briefed and are ripe for consideration.

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[3] "In a hybrid section 301 claim, 'a union member sues his employer for breach of the collective bargaining agreement, while also contending that his union breached its duty of fair representation. . . . A 'straightforward' section 301 claim involves a union suing an employer for breach of a collective bargaining agreement." *United Paperworks Int'l, Local #395 v. Itt Rayonier, Inc.*, 931 F.2d 832, 834 n. 7 (11th Cir.1991), *citing International Ass'n of Machinists and Aerospace Workers, Local Lodge No. 1688 v. Allied Products Corp.*, 786 F.2d 1561, 1563 (11th Cir.1986).

II. Statement of Facts.[4]

In 1981, the Fairfield Works consisted of steel making and flat roll product operations. *Affidavit of Lewis Milton McClean, Jr.*, United Steelworker's Submission of Evidence, p. 189.[5] A new Pipe Mill was due to be completed by the end of 1983. *Id.* The Company closed down the steel making and flat roll product operations at Fairfield in June 1982, because Fairfield had been experiencing losses in excess of one hundred million dollars per year for a number of years. *Id.* at 189-90. National steel production had dropped to a low level in 1982. *Id.* at 190. Lynn Williams, President of the Union, testified that 1983 was "one of the most horrendous periods in the Union history." Plaintiffs' Appendix, p. 547.[6] During the Fairfield Works shut down, between June 1982 and January 1984, Union members employed at Fairfield did not pay dues unless the member earned a paycheck or collected vacation pay.[7] PA 561-562.

In September 1983, the Company and the Union began negotiations aimed at reopening the Fairfield Works. USWE 190. E.B. Rich and Thermon Phillips negotiated on behalf of the Union. Phillips was Director of District

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[4] Plaintiffs did not include a statement of facts in their brief. In an earnest attempt to find all the evidence favorable to plaintiffs, the court has extracted most of the statement of facts from plaintiffs' brief. The court has not included factual statements which were not supported by citation to the evidence, nor has it included factual statements which were supported by incorrect citations of evidence. Considering the immense amount of evidence the parties have accumulated, the plaintiffs have not chosen the most helpful way to present their case.

[5] The Union's submission of evidence will hereinafter be styled, "USWE."

[6] Plaintiffs' Appendix will hereafter be styled "PA."

[7] The Union members recommenced paying dues when the Works reopened. PA 555, 565.

36 of the International Union,[8] and Rich was Sub-district Director for District 36. Although Rich and Phillips worked for the International Union, Theodore Stevenson, Jr. testified that he dealt with them about local issues rather than the presidents of the local unions. PA 232-236, 661.[9] At the inception of the negotiations, William Miller presented the Union negotiators with a proposed agreement containing all the concessions USX hoped to achieve. PA 130. The Company representatives advised the Union that if it could not achieve substantial labor cost reductions at the Fairfield Works, it intended to source the new Pipe Mill from the Lorrain or Gary plants of USX, and that it would give serious consideration to permanently shutting down the remaining portions of the Fairfield Works. USWE 191.

In the early days of the negotiations, E.B. Rich gave William Miller, Jr.[10] a list of names and, possibly, a draft of some language providing for indefinite Company leaves of absence for Union staff. PA 100a, 100b, 175,

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[8] Thermon Phillips was a member of the International Union's Executive Board, Secretary of the Union Negotiating Committee which negotiated the March 1, 1983 Basic Labor Agreement and the February 1, 1987 Basic Labor Agreement, and the Union Chairman of the Basic Steel Industry Audit and Review Committee. PA 660-661.

[9] There is no support in the cited record for plaintiffs' claim that Rich and Phillips were involved in processing grievances and arbitrations filed by rank-and-file members of the Union against the Company, or for plaintiffs' claim that Rich and Phillips had responsibility for implementing the FWA and the BLA. Mr. Stevenson did not discuss the procedure for handling grievances and arbitration, nor did he discuss Phillips' and Rich's role with regard to the collective bargaining agreements; he merely stated that he dealt with Rich and Phillips with regard to local matters, without elaboration. The court cannot assume Mr. Stevenson meant that Rich and Phillips had implemented the FWA and the BLA, or that they handled grievances and arbitration.

[10] Mr. Miller was one of the Company's negotiators.

191.[11] Mr. Miller gave the list of full time Union employees to Mr. Schick, who gave it to Mr. Hensarling [12] to get information about the people on the list. PA 100a-100b, 191. Mr. Schick testified that the matter was kept confidential because the negotiations were not public at that time. PA 195a-195b.[13]

On October 27, 1983, Mr. Miller or Mr. Carney [14] questioned Thermon Phillips about leaves of absence. PA 169-177. Mr. Miller testified that Rich, Phillips and Carney were present with him at that meeting, where the leaves of absence for the nine individuals listed by Rich were discussed. PA 100g-100h. Mr. Miller's notes of that meeting indicate the leaves of absence were presented as "[a] condition of settlement." PA 294. Mr. Miller and Mr. Carney did not agree the pensions would be forthcoming, and they told Rich and Phillips they "knew of no way that that could be done." PA 100g, 100h. Nevertheless, Mr. Miller testified that the leave of absence issue was one of the pension items on the negotiating table in October of 1983. PA 100c.

Thermon Phillips testified [15] that, after the agreement was completed on December 23, he, E.B. Rich, Mr. Carney and Mr. Miller discussed the leave of absence matter in a small room across the hall from the larger room

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[11] Rich relied on his Fifth Amendment right and refused to answer when he was asked if a Union attorney had reviewed the language. PA 179.

[12] It is apparent that Mr. Schick and Mr. Hensarling were Company employees, but plaintiffs have not provided evidence about their positions at USX. PA 100a-100b, 191, 169-77.

[13] Ted Stevenson, Jr. testified that he was not present at any meetings where leaves of absence and Company pensions for Union staff were discussed. PA 239.

[14] Mr. Carney was with the Company's law department. PA 100e.

[15] Mr. Phillips and Mr. Rich read portions of their previous grand jury testimony at their depositions, but otherwise refused to testify.

where they had been negotiating the Fairfield Works Agreement. PA 168-177. Although they did not raise the question on the last day of negotiations until after the agreement was complete, Rich and Phillips would not sign the final agreement until they had "an answer on their item." PA 101, 79-80, 114-116, 134-146. Miller testified that Rich and Phillips' signatures on the written agreement were essential. PA 141. Miller and Jim Carney spoke with J. Bruce Johnston and Miller told Johnston that he believed Rich and Phillips were serious in their refusal to sign the agreement until USX responded to their request. PA 79-81, 102. Miller testified that Johnston responded, without hesitation, by outlining specific and detailed conditions under which the Company would be willing to consider granting the leaves of absence and pensions. PA 80-81, 102-103, 109-113, 286. Miller and Carney told Rich and Phillips of the specific conditions Johnston had given them. PA 104, 143-146.

Rich and Phillips signed the agreement after Miller told them he believed USX would favorably consider their request. Id.[16] The FWA was in its final form when Rich and Phillips raised the pension issue on the last day of negotiations, and it was not changed from its final form before it was signed. PA 101, 134-46.

The Fairfield Works Agreement of December 24, 1983 resulted in: (1) elimination of over 500 jobs in the Fairfield Works (PA 273-277, 404); (2) elimination of all incentive pay except direct incentive pay, which was capped at 135% (PA 278); (3) elimination of all prior local working conditions and past practices concerning, inter alia, manning, crew sizes, job assignments, hours of work, and coffe breaks (PA 272, 405); (4) combination of maintenance shops into central shops (PA 275-277); (4) transfer of the rail and transportation division to Birmingham Southern Railroad (PA 273-274); (5)

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[16] One of USX's conditions was that the pensions would be made retroactive to "March 1." PA 103, 286.

contracting maintenance jobs (PA 276); (6) contracting janitorial and refuse hauling services (PA 277); (7) elimination of the biweekly 80 hour salary guarantee (PA 406); (8) granting to the Company full and sole discretion in determining manning and job assignments (PA 405); and (9) dismissal of pending complaints, grievances and arbitration cases. In August 1983, USX had estimated that the Fairfield Works would realize a profit of about $43 million in 1985, and in November 1983 USX had adjusted the estimated 1985 profit to $53 million. PA 471. In projecting the 1985 profit and loss, USX considered the impact of employee reductions, a 135% cap on direct incentives, elimination of indirect incentives, reduction in benefits to management levels and elimination of a bi-weekly salary guarantee. Id. In a December 20, 1983 analysis of savings associated with the Fairfield negotiations, the Company projected $23.5 million in annual net savings, including a $1 million savings from establishment of a management health care package. PA 474. However, in a December 23, 1983 telephone conversation, Phillips told Miller that the Union would not agree to the Company's first preference of a transfer to the management health care package, but that they would consider the Company's second preference, further reductions in the work force. PA 107-108.

Charles Schroeder of USX projected that USX would net employment cost savings associated with the final December 24 local agreement of $24 million per year. PA 404, 474. Larry Regan, President of Local 1014 at USX's Gary Works, stated by affidavit:

> Although USX was seeking local labor concessions in 1983 from the Union at several USX plants, the December 24, 1983 Fairfield Works Agreement contains the most severe concessions ever made to my knowledge in any local issues agreement ever negotiated between USX and the Union. To the best of my knowledge, no other steel plant in USX op-

erates under the extreme labor concessions contained in the 1983 Fairfield Works Agreement.

PA 579. The Company made a commitment in the 1983 Fairfield Works Agreement to install a slab caster at Fairfield, but the caster was not operational until 1989. PA 182-183.[17] David Roderick testified that, on a long term basis, Fairfield Works would not be quality competitive or cost competitive without a Slab Caster. PA 188.[18] Details called for by the Fairfield Works Agreement were not finalized as late as October 1984. PA 217-218.[19]

On July 20, 1984, Miller sent Johnston a proposal Miller had received from Jack Golden[20] for an amendment to the Company's leave of absence policy to allow certain individuals to receive indefinite leaves of absence. PA 297b-297g. In response to a July 12, 1984 *Birmingham Post Herald* report that Fairfield Works union main-

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[17] Mr. Roderick testified that the Company took a long time in determining what type of Caster to build, and that it took several years to engineer and build the Caster.

[18] On May 8, 1991, the *Birmingham Post Herald* reported that Fairfield Works was a semifinalist for the 1990 Alabama U.S. Senate Productivity Awards, and would receive a U.S. Senate Productivity Award Certificate of Merit recognizing productivity improvement. PA 643.

[19] There is no support in the cited portions of Mr. Short's deposition for plaintiffs' claim that the Fairfield Works Agreement negotiations continued into 1984. The Agreement was signed on December 24, 1983. As the portion of the deposition cited by plaintiffs, Mr. Short testified that the retirement of workers under the FWA was being done in a "piecemeal" fashion in 1984, and that someone known to him as "Butch" issued a memo in October 1984 stating that the retirees could not be dealt with in "dribs and drabs." Mr. Short testified it was a "detail" of the FWA that had not been finalized. He did not mention negotiations, nor did he indicate that additional negotiations were required.

[20] Mr. Golden was Director of the Union District 37. PA 297b. One of the conditions Bruce Johnston made on December 24, 1983 was that the proposal for the amendment to the leave of absence policy come from the International Union. PA 80-81.

tenance workers were being put on four day work weeks while the Company hired independent contractors to do maintenance work, J. Bruce Johnston wrote to William Miller, asking "What is the real story?" and "Are we in jeopardy of losing our momentum with E.B. and Thermon?" With respect to the second question, William Miller responded:

> . . . concerning Thermon Phillips and E. B. Rich, nothing in this incident has impacted our relationship with them. The thing they have their eye on, and the thing that will affect this relationship, is how we respond to the pension request which Jack Golden brought to us last week and which I forwarded to you last Friday.

PA 296-297. Miller wrote to Johnston on August 22, 1984, reminding Johnston of "this piece of unfinished business," and informing him that "E.B. Rich has called several times since learning of our organization changes. inquiring into the status of this matter." PA 297a. Thomas Sterling testified that he gave Rich a draft proposal for the change in August or September of 1984, and they had some discussion about an effective date of March versus September. PA 223-225. The final proposal to change the leave of absence policy was submitted to the Corporate Policy Committee on October 22, 1984. PA 421-22, 425. The change was to be effective retroactively to March 1, 1984. *Id.* In proposing the change, J. Bruce Johnston wrote:

> Under the Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representa-

> tives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.

PA 411. The Corporate Policy Committee adopted J. Bruce Johnston's proposal that allowed the Committee to approve longer indefinite leaves of absence to former employees while they worked for the International Union. The leaves of absence were to determine the Union employees' eligibility for Company pensions, and were available only to former employees of current steel producing operations who were actively employed by the Union in positions servicing bargaining units at the U.S. Steel division in which he had been employed. PA 411-412. In November 1984, six Union employees, including Rich and Phillips, applied for and received Company pensions from the United States Steel and Carnegie Pension Fund, retroactive to February 29, 1984. PA 298-383, 484-489. In addition to E.B. Rich and Thermon Phillips, extended leaves of absence were granted to Ralph Gurley, Carl Statum, Virgil Pierson, and Fred Shepherd. PA 648. Ed Owen of USX testified that he was told to not publicize the pensions when he was given the applications for processing. PA 157-159.

The corporate policy committee rescinded the revision of the USX leave of absence policy on May 14, 1987. PA 424-426. In May 1988, Phillips' pension was suspended, and the Fund began making payments into an escrow account. PA 446.[21] Lynn Williams, President of

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[21] **Although plaintiffs do not pursue the matter in brief, all of the pensions granted under the revised leave of absence policy were suspended.**

the Union, testified that his first information about the pensions came in a 1985 letter from J. Bruce Johnston, and that he referred the letter to Bernard Kleiman or Carl Frankel. PA 253, 255. The letter informed Williams that the Company had "approved requests for Leaves for six (6) International Union Representatives, qualifying those individuals for early retirements under the United States Steel Pension Plan." PA 434. In 1986, union employee Emmett Bruce Trasher talked with Bernard Kleiman, General Counsel of the Steelworkers, and Mr. Kleiman denied any knowledge about pension negotiations. PA 544e-544h. Mr. Thrasher filed suit against the Union, USX and the Fund on October 16, 1986, seeking a pension from USX. PA 388a. The Union denied the allegations in paragraphs 29 and 30 of Thrasher's complaint, in which Thrasher claimed the settlement of the pipe mill agreement included pension credited service for Gurley, Phillips, Rich and Statum, and that those men received pension monies as a result of the Fairfield negotiations. PA 393, 388i, 388e-388h. In 1988, James Sommerville and George Elliot sued the Union, USX and the Fund. PA 617. In a motion to dismiss filed on March 17, 1988, the Union asserted that the pensions claimed by Sommerville and Elliot were illegal under 29 U.S.C. S 186. PA 617-618. On April 13, 1988, the Union submitted the affidavit of Bernie Kleiman in the *Sommerville* case, in which Kleiman stated that Rich and Phillips had not retired from USX as of January 30, 1986. PA 493.

Lynn Williams testified that Union district directors commonly negotiated or arranged side letter agreements or contracts from the company to get unlimited leaves of absence, and the International Union never disciplined anyone for negotiating these agreements. PA 546. The "Manual for Representatives of the United Steelworkers of America" provides:

6. *Leaves of Absence and Pension Credits*

Representatives shall be entitled to obtain and maintain leave of absence status and/or pension credits from employers only to the extent that such leaves of absence and/or pension credits are expressly granted or authorized by the terms of a collective bargaining agreement with the USWA, and the duration of such leaves of absence an/or [sic] pension credits shall be in strict conformity to the limitations provided in such collective bargaining agreement.

PA 387-388. Lynn Williams testified:

I believe that every employee of the Union, or Staff and our Directors, and so on, that come from the shops where our members work, ought to be entitled to an indefinite leave of absence so long as they serve the Union, ought to be entitled at whatever time in the future history, so long as they haven't left the Union, to go back to their original place of employment, and I disagree very much with the restrictions which are now clear in my mind which USX has put on that all of these years in the Agreement. I would like us to have the kind of provisions I have described everywhere in the Union. I would look at it as one of our major failings as an institution, frankly, if we hadn't been able to do that nearly as successfully as we should have, and one of the reasons we haven't in my judgment, is that our leaders have tended not to make as much an issue of that as we should have over the years, and consequently, when we came to a layoff situation, for example, in the Union, we were in this difficult period and we had to lay people off, a number of people that would have had seniority and would have been entitled to go back into the places from which they came and whose members they had been serving directly, and fellow employees that they had

> been serving directly or indirectly all of these years were just out of luck and couldn't go back. Other Unions, some of the Unions have been able to do much better than that . . . So, I think that anybody, any representative that can push the leave of absence question past that and enable us to get wedges out there that will enable us to move that whole leave of absence question forward, I would think in that instance, that is a good thing, and highly ethical.

PA 260-261.

Union negotiators E.B. Rich and Thermon Phillips were convicted of requesting and accepting payments from USX in violation of section 302 of the Taft-Hartley Act, 29 U.S.C. § 186 and of conspiring to violate section 186. PA 643y, 643dd. USX was convicted of section 186 violations, ERISA violations, and mail fraud. PA 643w.

III. The Summary Judgment Standard.

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The party asking for summary judgment has the initial burden of demonstrating there is no genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing the nonmoving party has failed to present evidence in support of some element of his case on which he bears the ultimate burden of proof. *Celotex*, 477 U.S. at 322-23; *see* Fed. R. Civ. P. 56(a) and (b). However, "even after *Celotex* it is never enough simply to state that the

non-moving party cannot meet its burden at trial." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

Once the moving party has met his burden, rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions of file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex*, 477 U.S. at 324. The nonmoving party need not present evidence in a form necessary for admission at trial, however she may not merely rest on her pleadings. *Id.*

Once a properly made motion has been properly responded to, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The substantive law will identify which facts are material and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. His guide is the same standard necessary to direct a verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). However, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts". *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If the evidence is merely colorable, or is not significantly probative, sum-

mary judgment may be granted. *Anderson*, 477 U.S. at 249 (citations omitted); *accord Spence v. Zimmerman*, 873 F.2d 256 (11th Cir. 1989), *Brown v. City of Clewiston*, 848 F.2d 1534, 1537 (11th Cir. 1988). Furthermore, the court must "view the evidence presented through the prism of the substantive evidentiary burden," so there must be sufficient evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 254; *Cottle v. Storer Communication, Inc.*, 849 F.2d 570, 575 (11th Cir. 1988).

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—"whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

*Anderson*, 477 U.S. at 252. Nevertheless, credibility determinations, the weighing of evidence, and the drawing of inferences from the facts are the function of the jury, and therefore the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor. *Anderson*, 477 U.S. at 255. The nonmovant need not be given the benefit of every inference but only of every reasonable inference. *Brown v. City of Clewiston*, 848 F.2d at 1540 n.12. Although summary judgment is ordinarily inappropriate to decide questions of scienter, knowledge, and intent, *see, e.g., Washington v. Dugger*, 860 F.2d 1018, 1020-21 (11th Cir. 1988), the court should consider absence of a plausible motive in making its decision. *Matsushita*, 475 U.S. at 595.

## IV. The RICO Claims.

### A. The Union.

The Union argues it cannot be held criminally liable for the Union negotiators' violations of 29 U.S.C. § 186, that it cannot be held vicariously liable under RICO for the Union negotiators' violations of 29 U.S.C. § 186, that it did not ratify the bribe-taking,[22] and that it is not liable for conspiring to violate section 186. Finally, the Union argues the plaintiffs have not been injured by the alleged conduct.[23]

#### 1. The Union's criminal liability.

The Union argues that it could not be held criminally liable for Rich and Phillips' section 186 violations,[24] and that it is, therefore, not guilty of racketeering activity.

Racketeering activity consists of acts for which the defendant could be subject to criminal sanction. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488, 105 S.Ct. 3275, 87 L.Ed.2d 346, 354 (1985). In *Standard Oil Co. v. United States*, 307 F.2d 120 (5th Cir. 1962), the former Fifth Circuit held that a corporation could be found criminally liable for the acts of even its most menial employee, if the acts were performed within the scope of their employment. *Id.* at 127-8. "To be acting

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[22] The court recognizes that the defendants vigorously dispute the claim that the Union negotiators took a bribe from the Company, and uses the phrase only as a shorthand expression of the claims.

[23] The Union also joins in the Company's argument, discussed below, that the plaintiffs have not shown a "pattern" of racketeering activity.

[24] The predicate acts for plaintiffs' RICO claim are alleged violations of Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186. Subsection (a) of Section 186 prohibits, with some exceptions, payments by employers to employee representatives. Subsection (b) prohibits any person from requesting, demanding, receiving or accepting any payment prohibited in subsection (a).

within his employment, the employee must have intended that his act would produce some benefit to the corporation or some benefit to himself and the corporation second." *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984).[25] The *Standard Oil* court said:

> If it is done with a view of furthering the master's business, of doing something for the master, then the expectation or hope of a benefit, whether direct or indirect, makes the act that of the principal. The act is no less the principal's if from such intended conduct either no benefit accrues, a benefit is undiscernible, or, for that matter, the result turns out to be adverse.

*Standard Oil*, 307 F.2d at 128-9. *See Local 1814, International Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1394-5 (D.C. 1984) (the ordinary law of agency is applicable under the Taft-Hartley Act to the attribution of individual acts to employers and unions; the union is responsible for the acts of its agent even where self-interest is the predominant motive so long as the agent is actuated by the Union's business purposes to any appreciable extent).[26]

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[25] Since the civil right of action (18 U.S.C. § 1964) and criminal liability (18 U.S.C. § 1963) both arise out of violations of section 1962, the statute is interpreted the same in both civil and criminal matters. *See Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970 n. 2 (11th Cir. 1986).

[26] The Union argues the agency principles applied in *Local 1814* do not apply here because *Local 1814* was not a RICO case or a criminal case under § 302. It contends that the statute at issue in *Local 1814*, the NLRA, is unlike RICO in that it is predicated on respondeat superior liability. However, respondeat superior liability is clearly applicable to the RICO predicate acts at issue here, violations of 29 U.S.C. § 186. *See* 29 U.S.C. § 185(b) (providing "[a]ny labor organization which represents employees in an industry affecting commerce . . . shall be bound by the acts of its agents"). Therefore, the Union could be found criminally liable for its agents' violations of 29 U.S.C. § 186. Section 185(e), which provides that actual authorization or subsequent ratification

The Union argues the pensions received by the Union negotiators were taken solely to serve the negotiators' interests and not to benefit the Union.[27] It claims that it could not, therefore, be subject to criminal sanctions under section 186. Plaintiffs argue the Union benefitted from the negotiators' actions because: (1) the Union benefitted from the Fairfield Works Agreement; (2) the Union saved the salaries and expenses of Ralph Gurley, Carl Statum and Virgil Pearson, who retired early from the Union upon getting the pension benefits from USX; and (3) the Union benefitted from the "leaves of absence and payment of pension benefits to Union representatives and officials," according to Union President Lynn Williams. Evidence that the Union benefitted from the negotiators' actions may be probative in determining whether the agents' purpose and motive was to benefit the Union. *Standard Oil*, 307 F.2d at 128.

Concerning the plaintiffs' first contention, evidence that the Union derived benefits from the Fairfield Works Agreement is not, alone, proof the Union benefitted from Rich and Phillips' violations of section 186. The plaintiffs have not articulated any argument in support of their claim that the benefits the Union received from the Fairfield Works Agreement were the equivalent of benefits from the section 186 violations.[28] As to plaintiff's

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of the specific act is not controlling in determining whether any person is acting as the agent of another, is nearly identical to the provision at issue in *Local 1814*. 29 U.S.C. § 185(e), 29 U.S.C. § 152(13).

[27] The Union cites portions of plaintiffs' complaint in support of its claim that only the negotiator's interests were served by the receipt of pension benefits. Nowhere does the complaint contain allegations that suggest the Union negotiators intended to benefit only themselves, and that conclusion is not a necessary inference from the allegations.

[28] Plaintiffs have cited a case in which a union obtained a company's agreement to the unionization of its shop and payments to union officials in return for a union promise to steer other business

second response, there is no showing that the Union benefitted from the retirement of its officials. The Union could not have saved the salaries and expenses of retiring Union officials unless it did not replace them, and there is no showing that the Union left those jobs vacant.

Lynn Williams' opinion, that Union employees should get indefinite leaves of absence from the shop in which they previously worked so they could go back to their old job if the Union had to lay them off, is not evidence that the Union benefitted from the Company's change of its leave of absence policy. PA 258-262. The leave of absence policy affected pension benefits, not recall rights. PA 411-412. Plaintiffs have, however, presented evidence that District 36 officials other than the Union negotiators applied for and received extended leaves of absence from the Company. Plaintiffs' Brief at 50, PA 298-382. Furthermore, although only Union officers of District 36 received leaves of absence, the policy as written applied to any Union official who had been employed in United States Steel Corporation's steel producing operations. PA 412. Evidence that Union officials other than the negotiators benefitted or could have benefitted from the negotiator's demand for leaves of absence is circumstantial evidence that the negotiators intended to benefit the Union. Therefore, plaintiffs have some evidence tending to show the Union could be criminally liable under section 186 for the negotiators' demand of leaves of absence from the Company, 29 U.S.C. § 186(b)[29], and the Union's

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to the company. There is no evidence here, however, that the Union obtained USX's agreement to the FWA because of the section 186 violations. Other than citation of the case, plaintiffs made no argument or claim that USX would not have signed the Fairfield Works Agreement but for the section 186 violations. Plaintiffs' Brief, pp. 46-47.

[29] The Union argues the plaintiffs cannot cite a case in which a Union was found criminally culpable for the bribing of its officials by an employer. The present RICO action does not rest on bribery,

motion for summary judgment will be denied insofar as it is based on the claim that the Union cannot be criminally liable for the negotiators' actions.

2. The Union's Civil Liability.

The Union argues it cannot be found civilly liable for RICO violations under principles of vicarious responsibility, since it is a "victim" enterprise. It contends the main purpose of RICO is to address the infiltration of legitimate business by wrongdoers, and the essence of plaintiffs' claim is that the Union was misused by the Company and the Union negotiators.

The majority of the circuits have found that, for the purposes of section 1962(c)[30], a victim enterprise cannot be held liable under RICO. *See, e.g. Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1358-59 (3rd Cir. 1987). However, in *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), the Eleventh Circuit held a corporation may be simultaneously both a defendant and the enterprise under section 1962(c). *Id.* The Union suggests that the Eleventh Circuit would limit the rule to those situations in which the corporation is a central figure in the criminal scheme as it was in *Hartley* and would not find an enterprise corporation vicariously liable for the acts of its agents when the corporation is a passive instrument or victim of the racketeering activity. *See Haroco Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 400-402 (7th Cir. 1984).

The Union relies on the plaintiffs' pleadings to support its claim that it is a "passive instrument" or "victim"

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but on violations of Section 186. Section 186 does not require evidence of a quid pro quo. 29 U.S.C. § 186.

[30] Section 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

enterprise. In paragraph 87 of their complaint, plaintiffs allege the Union was an enterprise which the Company established, maintained, and controlled with income derived from a pattern of racketeering activity, and they also allege the Union conspired with the Company to violate subsections 1962 (a), (b), and (c). The same conspiracy claim appears in paragraphs 85, 86, and 88, but the Union is not the alleged victim enterprise in those paragraphs. Plaintiffs allege that the Fairfield Works was the victim enterprise in paragraph 85, that the Fund was the victim enterprise in paragraph 86, and that District 36 of the Union was the victim enterprise in paragraph 88. Since plaintiffs are free to plead in the alternative, they need not consistently pursue the theory that the Union was the victim enterprise. Fed.R.Civ.P. 8(e)(2). The factual allegations underlying plaintiffs' RICO claim are (1) during the Fairfield Works negotiations, the Union negotiators asked for or received from the Company extended leaves of absence for pension benefits; (2) the Company agreed to give the Union negotiators extended leaves of absence for pension benefits; (3) the Company's Corporate Policy Committee revised the leave of absence policy to allow for the pensions on October 4, 1984; and (4) the Company thereafter began providing leaves of absence for pension benefits to six Union employees, including the Union negotiators, and began paying pension benefits to those Union employees. Plaintiffs' February 28, 1989 Amended Complaint, para. 76-89, 20-21, 30-37, 40. Nowhere does the complaint include allegations that the Union was injured by the Company's payment of pension benefits to Union employees. Neither can the court conclude the Union was a victim from the plaintiffs' allegations that the Fairfield Works Agreement was affected by bribe-taking and the plaintiffs were injured thereby. Although plaintiffs claim they were injured by concessions in the Fairfield Works Agreement resulting from the corruption of the negotiating process, the injury to the plaintiffs is not

necessarily injury to the Union. The court cannot presume the Union was damaged because its members may have been damaged.

The Union's claim that it is a "victim" enterprise is, therefore, unsupported in the record. Since the Union has cited no other evidence in support of its claim that it is a "victim" enterprise, it has not shifted the burden of coming forward with evidence to the plaintiffs. Additionally, as discussed above, the plaintiffs have some evidence tending to show that the Union benefitted from the negotiators' actions, since Union officials other than the negotiators received USX leaves of absence.

3. Ratification and other theories of civil liability.

In addition to their general claim that the Union is civilly liable for the negotiator's acts, the plaintiffs press several specific theories of civil liability.

a. Apparent Authority.

Plaintiffs argue the union is civilly liable for the negotiators' acts even in absence of a benefit to the Union because its negotiators were acting with apparent authority and the Union did not disavow or repudiate their acts.[31] *Amendolare v. Schenkers Int'l Forwarders, Inc.*, 747 F.Supp. 162, 170 (E.D.N.Y. 1990), *N.L.R.B. v. Georgetown Dress Corp.*, 537 F.2d 1239, 1244 (4th Cir. 1976).

An agent has apparent authority to bind the principal where the principal has held out the agent as having such authority or has permitted the agent to represent

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[31] Plaintiffs present Lynn Williams' testimony (that he believed Union representatives should get leaves of absence for recall rights) in support of their claim that the negotiators had apparent authority to negotiate for the leaves. Plaintiffs also claim that evidence the Union did not discipline employees for negotiating regarding these types of leaves of absence is evidence that the negotiators' had apparent authority to act.

that he has such authority. *United States v. Schaltenbrand*, 930 F.2d 1554, 1560 (11th Cir. 1991). The essential characteristic of an agency is the power of the agent to commit his principal to business relationships with third parties. *Id.* In *Amendolare*, the court said ". . . a principal may be liable for the acts of an agent acting with apparent authority even where there is no benefit to the principal." *Amendolare*, 747 F.Supp. at 170, citing Restatement (Second) of Agency § 261. However, that Restatement section applies only where the principal puts the agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons. Id. The *Amendolare* plaintiffs claimed they were defrauded by Union officials. Here, the plaintiffs do not claim the Union negotiators, acting with apparent authority, made misrepresentations to them upon which they relied. Therefore, *Amendolare* does not apply in this case. If the negotiators had apparent authority to demand leaves of absences from the Company, and the court does not so decide, there is no evidence the plaintiffs relied on that apparent authority to their detriment.

b. Ratification.

The plaintiffs also claim the Union is vicariously liable for the negotiator's actions because it ratified their acts by overt actions, or by failing to act after gaining knowledge of the negotiator's acts. "A ratification occurs when the benefits of the purportedly unauthorized acts are accepted [by the principal] with full knowledge of the facts under circumstances demonstrating the intent to adopt the unauthorized arrangement." *In re Securities Group*, 926 F.2d 1051, 1055 (11th Cir. 1991) (citations omitted). The existence of a ratification depends upon the circumstances and is a question to be determined by the factfinder. *Id.* "A principal can ratify the unauthorized act of an agent purportedly done on behalf of

the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." *McDonald v. Hamilton Electric, Inc.*, 666 F.2d 509, 514 (11th Cir. 1982).

The Union argues the issue of ratification does not arise unless the acts were undertaken by the negotiators on behalf of the Union, *citing McDonald*, 666 F.2d at 514, Restatement (Second) of Agency §§ 82, 85, at 210, 217-18 (1958). As noted above, the plaintiffs have some evidence tending to show that the negotiators' actions benefitted the Union, and the plaintiffs' claim that concessions in the Fairfield Works Agreement damaged them is not evidence that the Union was damaged by those same concessions, since the interests of the Union are not necessarily co-extensive with the interests of the Union members. Thus, the Union has not pointed to evidence supporting its claim that Rich and Phillips were betraying the Union for their own benefit.

The Union further argues it cannot be said to have ratified the negotiators' actions absent evidence that it had knowledge of a bribe and, since there is no evidence that the negotiators exchanged concessions for pensions, there is no evidence the Union had knowledge of a bribe. Although evidence of a *quid pro quo* may be relevant to plaintiffs' claims for damages, it is not an element of the section 186 violations. Section 186 provides that it is unlawful merely to "request, demand, receive, or accept . . . any . . . thing of value." Therefore, to prove the Union ratified the predicate acts, plaintiffs need not prove the Union had knowledge that the negotiators had taken a bribe, but that the Union knew that the negotiators received or accepted the leaves of absence from the Company. Furthermore, the Union has not sustained its burden of showing there is no genuine issue of material fact as to its knowledge merely by claiming plaintiffs have no evidence that the Union had knowledge. *Coats & Clark*, 929 F.2d at 608.

The Union also contends it did not ratify the negotiators' actions, citing *Washington v. Kirksey*, 811 F.2d 561, 564 (11th Cir. 1987). Again, the Union made no specific reference to the evidence and has not, therefore, shifted the burden of coming forward with evidence to the plaintiffs. *Coats & Clark*, 929 F.2d at 608. Plaintiffs argue the Union affirmed the actions of Rich and Phillips after gaining full knowledge of the material facts. Plaintiffs' brief at 55-56, *citing Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980), *Rodonich v. House Wreckers Union Local 95 of Laborers Int'l Union*, 624 F.Supp. 678, 685 (S.D.N.Y. 1985), *modified* 817 F.2d 967 (2d Cir. 1987); *Borowiec v. Local 1570 of Int'l Brotherhood of Boilermakers, etc.*, 626 F.Supp. 296, 304 (D.Mass. 1986); *Teas v. Local 413, Int'l Brotherhood of Teamsters, etc.*, 504 F.Supp. 12 (S.D. Ohio 1978).[32] Plaintiffs also argue the Union ratified the negotiators' actions when it failed to investigate or act to curb the negotiators' actions after it gained knowledge of their acts, citing *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d, 1384, 1396-97 (D.C. Cir. 1984), *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs, and Helpers Local 639*, 839 F.2d 782, 786 (D.C. Cir. 1988), *vacated* — U.S. —, 109 S.Ct. 3235, 106 L.Ed.2d 583 (1989), *replaced by* 913 F.2d 948 (D.C. Cir. 1980) (union's knowledge of illegal strike coupled with failure to act was proof that union participated or authorized or ratified actions for purposes of 29 U.S.C. § 106).[33]

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[32] In *Teas*, the court noted the defendant had the power to cease collection of an unauthorized dues increase, but it did not stop the collection after it had knowledge the dues increase was unlawfully imposed. The plaintiffs here have presented no evidence that the Union had the power to stop the pension payments to Rich and Phillips.

[33] In a strike context, "[t]here can be no rigid requirement that a union affirmatively disavow such unlawful acts as may previously have occurred . . . What is required is proof, either that the union approved the violence which occurred, or that it participated ac-

In support of their claims that the Union overtly or implicitly ratified the negotiators' actions, the plaintiffs point to the letter Union President Lynn Williams received from J. Bruce Johnston on or about March 5, 1985.[34] In the letter, Johnston informed Mr. Williams that six unnamed International Union representatives had received longer leaves of absence from the Company than was provided for in the Basic Labor Agreement. PA 253-257, 434-435. Johnston did not inform the Union that the change came about because of the Fairfield negotiations, or because of any request by the Fairfield negotiators. The Union therefore cannot be said to have impliedly ratified the negotiators' acts by failing to act on the information in the letter, since there was no information about the negotiators' acts in the letter. Plaintiffs also point to evidence that Bernard Kleiman, general counsel for the Union, denied knowledge of pension negotiations in 1986 conversations with Bruce Thrasher. PA 544e-544h. That evidence does not tend to prove that the Union overtly ratified the negotiators' actions by trying to "cover-up" without a showing that Mr. Kleiman knew of the pension negotiations when he spoke with Thrasher in 1986. Plaintiffs also contend that, on March 17, 1988, the Union filed a motion to dismiss in *Sommerville,* in which it claimed that the pension James Summerville sought under the Company's revised leave of absence policy violated 29 U.S.C. § 186. Again, there is no evi-

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tively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force." *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 739, 86 S.Ct. 1130, 1145, (1966).

[34] Plaintiffs have not claimed, nor have they produced evidence, that the Union knew of the negotiators' actions before 1985, when Lynn Williams received the letter from Bruce Johnston informing him that six union representatives had received extended leaves of absences and company pensions. There is no evidence in the record to show that, even then, the Union knew the leaves of absences were discussed during the 1983 Fairfield negotiations.

dence the Union had any knowledge of the truth of the allegations in the *Sommerville* action, and its motion to dismiss is not, therefore, proof of an attempt to cover-up or a failure to act after gaining full knowledge of the truth.[35] The Union's knowledge of James Summerville's allegations of section 186 violations by Union negotiators is not the same as knowledge of section 186 violations by Union negotiators.[36]

However, if plaintiffs can satisfy a jury that the Union benefitted from the arrangement between USX and the Union officials, the jury may find the Union's retention of Rich and Phillips in their offices after the Union had notice they were receiving Company pensions in violation of section 186 "is tantamount to acquiescence or condonation of their unlawful acts." *Local 1814*, 735 F.2d at 1396. Furthermore, although the evidence plaintiffs presented here does not support their claim that the Union overtly or impliedly ratified the negotiators' actions, plaintiffs are entitled to further discovery on this issue. Plaintiffs have relied on the letter Lynn Williams received in 1985 as proof that the Union had knowledge of the negotiators' acts. As discussed above, the letter itself did not provide the Union with any information about the negotiators' actions and it does not support the plaintiffs' ratification theory. However, plaintiffs have not been able to finalize discovery about the Union's response to the letter, since that discovery is the subject of an interlocutory appeal. Plaintiffs have not been able to complete

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[35] Plaintiffs allege that the Union took no action against Rich and Phillips until after their convictions, but the citation provided by plaintiffs is inaccurate. See Plaintiffs' Brief, p. 58, PA 651.

[36] The Union also claims any "ratification" by another Union official could not be attributed to the Union, repeating its argument that the Union cannot be vicariously liable because it received no benefit from the alleged Section 186 violations. As noted above, the plaintiffs have presented some evidence tending to show the Union benefitted from the negotiator's actions, and there is no evidence to support the Union's claim that it was a "victimized" enterprise.

their discovery of Mr. Kleiman for the same reason. Plaintiffs are, therefore, entitled to reserve this claim pending the outcome of the appeal. Finally, as noted above, the Union has failed to satisfy its burden of pointing to evidence showing that it did not adopt the negotiator's actions, and the Union has, therefore, failed to shift the burden of coming forward with evidence to plaintiffs on this issue. The Union's burden on summary judgment is not satisfied merely by arguing the plaintiffs have no evidence to support an element of their claim. *Coats & Clark*, 929 F.2d at 608.

c. Fiduciary Duty.

At various points in their brief, the plaintiffs claim the Union is liable for the negotiators' actions because the Union owed them a fiduciary duty to negotiate faithfully and solely on behalf of the plaintiffs and class members, citing *United States v. Boffa*, 688 F.2d 919, 930 (3rd Cir. 1982)[37] and *Aguinaga v. John Morrell & Co.*, 112 F.R.D. 671 (D. Kan. 1986). Plaintiffs' Brief, p. 22, 53-54, 61, 78.

Plaintiffs argue the Union is vicariously liable for the negotiators' acts because it is a fiduciary to the plaintiffs and it acquiesced in or concealed a breach of trust by its co-fiduciaries, it permitted the agents' actions, it did not use reasonable care in retaining the agents, and it failed to take steps to compel its co-fiduciaries to redress their breach of trust. Plaintiffs' Brief, p. 53-54, citing Restatement (Second) of Trusts, §§ 224(2)(c) and (e), 225(2).

The Union's duty of fair representation is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air*

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[37] The court finds *Boffa* inapposite. It involved the fiduciary duty owed by union officials to union members under 29 U.S.C. § 501(a), not fiduciary duties owed by the union itself. *See Erkins v. Bryan*, 785 F.2d 1538, 1544 (11th Cir. 1986); *United States v. Boffa*, 688 F.2d 919, 930 (3rd Cir. 1982).

*Line Pilots Ass'n Int'l v. O'Neill,* —— U.S. ——, 111 S.Ct. 1127, 113 L.Ed.2d 51, 62 (1991).[38] As the exclusive bargaining representative of the employees at Fairfield, the Union has a statutory duty to fairly represent all of the employees, both in its collective bargaining and in its enforcement of the resulting collective bargaining agreement. *Vaca v. Sipes,* 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The duty also applies in "other instances in which a union is acting in its representative role. . . ." *O'Neill,* 113 L.Ed.2d at 62. "Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* A union owes employees a duty to represent them adequately as well as honestly and in good faith. *O'Neill,* 113 L.Ed.2d at 62, citing Restatement (Second) of Trusts § 174 (1959). Mere negligence will not be a violation of the duty. *Rawson,* 496 U.S. at —, 109 L.Ed.2d at 377. Because the duty of fair representation is imposed on the union as a result of its position as exclusive bargaining representative, it applies only to union conduct arising from the Union's position as representative. *Bass v. International Brotherhood of Boilermakers,* 630 F.2d 1058, 1062 (5th Cir. 1980). Thus, the union owes the duty to represent fairly the interest of each employee in the unit in dealings with the employer, but union conduct that affects only an individual's relationship within the union structure is not subject to the duty of fair representation. *Id.* at 1062-63.

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[38] A union is not prohibited from assuming additional duties to the employees by accepting a duty of care through a contractual agreement, but the employee claiming the union owes him a more far-reaching duty must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees. *United Steelworkers of America v. Rawson,* 496 U.S. 362, 110 S.Ct. 1904, 109 L.Ed.2d 362, 376 (1990).

Plaintiffs claim the Union, because of its fiduciary status, should have fired the negotiators once they were accused of a breach of trust, and should have made the negotiators redress the alleged breach of trust. Although the union has a fiduciary duty to its members which may have common law overtones,[39] the duty extends only to the union's actions in dealing with the plaintiffs' employer. The plaintiffs have presented no support for their claim that the Union's fiduciary responsibility implicates the Union's relationship with its own employees.

Furthermore, under the common law the Union would become liable for the negotiators' breach of trust if it failed to fulfill its own fiduciary duties; it would not become vicariously liable for all the negotiators' criminal actions. Restatement (Second) of Trusts, § 224(1) and § 225, Comment A. The plaintiffs have made no coherent argument in support of their claim that such a breach of fiduciary duty would make the Union vicariously liable for the negotiators' racketeering activity. A breach of fiduciary duty is not, in itself, racketeering activity constituting a predicate act under RICO. 18 U.S.C. § 1961(1). The union is, therefore, entitled to summary judgment on plaintiffs' claim that it is vicariously liable for the negotiators' RICO violations because it is guilty of a breach of its fiduciary duty of fair representation.

Plaintiffs also claim the Union is guilty of aiding and abetting even if it committed no overt act in support of

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[39] Although the court in *Shimman v. Frank*, 625 F.2d 80, 99 n. 39 (6th Cir. 1980), seemingly rejected the idea that the fiduciary duty of union officials was derived from the common law, the court notes that the union's fiduciary duty does have some common law roots. *See O'Neill*, 113 L.Ed.2d at 62 (" a union owes employees a duty to represent them adequately as well as honestly and in good faith. . . ." (citing Restatement (Second) of Trusts § 174)); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519, 529 (1990) (court analogizes union's duty of fair representation to that of a trustee to the trust beneficiary, citing Restatement (Second) of Trusts § 199(c)).

the negotiators' actions because it was silent in the face of a fiduciary duty to disclose "material facts affecting the interest of the beneficiary which [it] knows the beneficiary does not know and which the beneficiary needs to know for his own protection. . . ." Plaintiffs' Brief, p. 61-62, citing Restatement (Second) of Trusts, § 173, Comment D.[40] To establish liability for aiding and abetting, plaintiffs must show the Union participated in the criminal venture through an overt act designed to aid in the success of the venture. *United States v. Hewitt*, 663 F.2d 1381, 1385 (11th Cir. 1981). Proof of "mere negative acquiescence" is insufficient to establish aiding and abetting liability. *Armco Industrial Credit Corp. v. SLT Warehouse Co.*, 782 F.2d 475, 486 (5th Cir. 1986). Plaintiffs' reliance on *United States v. Local 560 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, et al.*, 780 F.2d 267, 284 (3rd Cir. 1985) is misplaced, since the defendants in that action had committed one or more overt acts, and only their intent to facilitate the crime was inferred from proof that they knew of the commission of the crime and failed to act when they had an affirmative duty to do so. *Id.* Neither does *Brennen v. Midwestern United Life Ins. Co.*, 259 F.Supp. 673 (N.D.Ind. 1966) support plaintiffs' position since it involves aider and abettor liability under section 10(b) of the Securities Exchange Act of

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[40] The court makes no decision regarding the existence of such a duty. Plaintiffs cite *Baskin v. Hawley*, 807 F.2d 1120, 1131 (2nd Cir. 1986) in support of their claim that the Union has a duty to disclose to its members information that it knows might give the members a claim against the Union. *Baskin* does not support the plaintiffs' argument, since the issue there was whether an active concealment of a known injury tolled the statute of limitations. *Id.* There is no support in the *Baskin* case for plaintiffs claim that the Union has a general duty to disclose information to its members, or for plaintiffs claim that the Union would be guilty of aiding and abetting if the Union failed to fulfill such a duty. The *Baskin* court held merely that a union's active concealment of a cause of action from its members tolled the statute of limitations.

1934. *See Schneberger v. Wheeler*, 859 F.2d 1477, 1480 (11th Cir. 1988). The court has been unable to find a similar application of the rule outside the context of the 1934 Act. Therefore, the Union is entitled to summary judgment on plaintiffs' claim that it is liable as an aider and abettor due to its failure to disclose the negotiators' actions.

Plaintiffs also claim the Union, because of its fiduciary status, is liable as a co-conspirator "simply because the Union failed to disclose or stop the illegal acts of Rich and Pillips even though the Union clearly had the power to do so." Plaintiffs' Brief at 74. The Union's failure to act upon knowledge of the negotiators' actions may be some evidence which tends to show the Union was a co-conspirator, but plaintiffs have cited no support for their claim that the failure to act coupled with a fiduciary duty to act,[41] by itself, makes the Union liable for conspiracy. The Union is entitled to summary judgment on plaintiffs' claim that it is liable for the negotiators' RICO violations because it breached its duty of fair representation.

d. Aiding and Abetting.

In addition to the claim that the Union's silence in the face of an affirmative fiduciary duty to speak made the Union liable as an aider and abettor, plaintiffs claim the Union is liable as an aider and abettor because it committed three overt acts designed to facilitate the negotiators' criminal activity. Plaintiffs refer to the Union submissions in *James Sommerville, et al. v. United Steelworkers of America, AFL-CIO-CLC, et al.*, CV-88-G-0105-S, its answer in *Emmett Bruce Thrasher v. United Steelworkers of America, AFL-CIO-CLC, et al.*, CV-86-

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[41] The court does not decide whether the Union had a fiduciary duty to disclose any information about illegalities in the negotiating process. It only concludes that any such failure would create liability for a breach of fiduciary duty only, not liability as a co-conspirator or aider and abettor.

*C-1930-S,* and Bernard Kleiman's representations to Bruce Thrasher that he had no knowledge of the Union negotiators' pensions.[42]

One who aids, abets, counsels, commands, induces or procures the commission of an offense against the United States is punishable as a principal. 18 U.S.C. § 2. The Third Circuit has found that an aider and abettor of two predicate acts can be civilly liable under RICO. *Petro-Tech, Inc. v. Western Company of North America,* 824 F.2d 1349, 1356 (3rd Cir. 1987), *and see Armco Industrial Credit Corp. v. SLT Warehouse Co.,* 782 F.2d 475, 486 (5th Cir. 1986). As noted above, to establish liability for aiding and abetting, plaintiffs must show the Union participated in the criminal venture through an overt act designed to aid in the success of the venture. *United States v. Hewitt,* 663 F.2d 1381, 1385 (11th Cir. 1981). To prove aiding and abetting, the plaintiffs must establish: (1) the Union associated itself with the crime; (2) the Union intended to bring the crime about; (3) the Union sought by its actions to make the crime succeed; and (4) the Union shared the same unlawful intent as the actual perpetrator. *United States v. Kelly,* 888

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[42] Plaintiffs claim they need depositions of several Union officials to establish the Union's knowledge of the pensions, and they have been unable to complete those depositions due to the pending appeal. The courts' December 5, 1990 and January 10, 1991 discovery orders are the subject of a pending interlocutory appeal. The December 5, 1990 order related only to Company officials. However, the January 10 order concerned the proper application of the attorney-client privilege to a conversation between Lynn Williams and Bernard Kleiman about the 1985 letter, and to production of documents, particularly to notes made by Kleiman during the Thrasher conversations which the court found to be undiscoverable work product. Although questioning of Kleiman about his knowledge of the 1983 negotiations at the time he spoke with Thrasher does not require production of his notes, it may implicate Kleiman's conversation with Williams. As discussed below, plaintiffs are entitled to complete their discovery of Kleiman before responding to the Union's summary judgment motion on this issue.

F.2d 732, 742 (11th Cir. 1989); *United States v. Hamblin*, 911 F.2d 551, 557-58 (11th Cir. 1990). Proof of "mere negative acquiescence" is insufficient to establish aiding and abetting liability, there must be evidence that the Union committed an overt act designed to aid in the success of the venture. *Armco Industrial Credit Corp. v. L.L.T. Warehouse Co.*, 782 F.2d 475, 485-86 (5th Cir. 1986). *Armco*, 782 F.2d at 485.

Plaintiffs have identified three acts which they claim are affirmative acts on the part of the Union which aided in the success of the venture: (1) the Union's December 1, 1986 answer in *Thrasher*, in which it "[denied] that [Thermon] Phillips received a Company pension" (Plaintiffs' Brief, p. 60); (2) the affidavit Bernard Kleiman [43] submitted in *Sommerville* in which he stated that the Union negotiators had not retired from the Company by 1986; and (3) Bernard Kleiman's 1986 conversations with Bruce Thrasher, in which he denied knowledge of the pension negotiations or Thrasher's eligbility for a pension. The plaintiffs have not articulated any basis for their claim that these actions on the part of the Union constituted aiding and abetting, but they are presumably claiming the Union aided in the cover up or concealment of the section 186 violations.[44]

In the *Thrasher* complaint, the plaintiff alleged "the settlement to the pipe mill agreement included pension credited service for . . . Thermon Phillips . . ." and "[Phillips] currently and . . . in the past received pension monies as a result of the negotiations referred to herein." PA 388i. The Union merely denied those allegations. PA 393. The Union argues the denial was correct since

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[43] Mr. Kleiman is general counsel for the Union.

[44] In their complaint, the plaintiffs do not allege the Union's RICO liability is predicated on aiding and abetting liability. They have not articulated a theory of aiding and abetting liability in either their complaint or their brief in opposition to the Union's summary judgment motion.

no agreement was reached in the negotiations and the Company unilaterally decided to provide the pension credit and pensions ten months after the negotiations were concluded. The question of whether the pensions were received as a result of the Fairfield negotiations is a disputed question of fact, and the Union is not entitled to summary judgment on that basis. It has not challenged the plaintiffs' evidence on any other ground.[45]

Bernard Kleiman submitted his affidavit in *Sommerville* on April 13, 1988. Mr. Kleinman stated that, "as of January 30, 1986, Ralph Gurley, Thermon Phillips, E. B. Rich and Carl Statum were active employees of the International Union and had not retired from USX." PA 493. The Union readily admits Phillips and Rich were retired from USX by January 30, 1986, but claims the date in Kleiman's affidavit was a mistake copied from the *Sommerville* plaintiffs' complaint. See Union Evidence, p. 149. It also argues there was nothing misleading in the memorandum to which the affidavit was attached, since the affidavit was cited in support of a claim that the negotiators were employed by the Union at the time of the negotiations. The Union makes a persuasive argument, but the court cannot decide on summary judgment if the statement was due to neglect or design.

Plaintiffs also argue that, in 1986, Bernard Kleiman denied knowledge of the pensions given to Rich and Phillips. The Union argues the evidence is undisputed that Kleiman knew nothing about the pension negotiations. There is no evidence that Kleiman had knowledge of the pension negotiations at the time he made the denials, but plaintiffs have not completed their discovery and, in particular, have been unable to completely depose Kleiman during the pendency of the interlocutory appeal

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[45] The Union also argued that it cannot be liable as an aider and abettor since it is a victim enterprise. As noted above, the Union's claim that it is a victim enterprise is unsupported in the record.

as to discovery issues. Therefore, the present lack of evidence about Kleiman's knowledge of the pensions cannot form the basis for summary judgment. Rule 56(f), Fed.R.Civ.P.

Although the court is not overwhelmed with the strength of plaintiffs' case for aiding and abetting liability, the plaintiffs are entitled to continue their discovery before this claim is foreclosed. The Union motion for summary judgment will, therefore, be denied as to the plaintiffs' claim that the Union aided and abetted in the commission of section 186 violations.

e. Conspiracy.

Under RICO, a defendant need not personally commit the predicate acts provided the evidence is sufficient to connect him to the fraudulent scheme. *Casperone v. Landmark Oil & Gas Corp.*, 819 F.2d 112, 115 (5th Cir. 1987). To support a RICO conspiracy charge under 18 U.S.C. 1962(d), the plaintiffs need not prove the Union could be guilty as a principal for the racketeering activity, but that the Union conspired to commit the substantive RICO offense and was aware that others had done likewise. *United States v. Norton*, 867 F.2d 1354, 1359 (11th Cir. 1989). To establish a conspiracy to violate RICO, the plaintiffs must prove the Union, by its words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of the enterprise, through a pattern of racketeering activity. *United States v. Fernandez*, 797 F.2d 943, 950 (11th Cir. 1986), *citing United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980). A pattern requires at least two acts of racketeering activity. *Id.* The plaintiffs must present proof that the Union, by word or deed, agreed to commit the two predicate acts necessary to form the basis of the RICO charges. *Id.* Evidence of a person's efforts to assist in the concealment of a conspiracy may support an inference that he joined it while it was still in opera-

tion. *United States v. Gold,* 743 F.2d 800, 825 (11th Cir. 1984). Mere knowledge, approval or acquiescence in another's crime does not make one a co-conspirator. The Union argues it is entitled to summary judgment on plaintiffs' conspiracy claim because it is not vicariously liable for the negotiators' actions since it is a victim enterprise. As noted above, the Union has cited no support in the record for its claim that it is a victim enterprise. *Coats & Clark,* 929 F.2d at 608. Furthermore, plaintiffs have once again pointed to the *Thrasher* answer, the *Sommerville* affidavit, and Kleiman's conversations with Thrasher as support for their claim that the Union was a co-conspirator. A jury could reasonably infer that the Union joined in while the conspiracy was still in operation from evidence that the Union attempted to cover up the conspiracy. *Gold,* 743 F.2d at 825. Until plaintiffs complete their discovery, the Union is not entitled to summary judgment on the basis that it did not conspire with USX and the Fund.

4. The Injury.

In addition to claiming it is not liable for the negotiators' actions, the Union argues the plaintiffs have no evidence they were injured in their business or property by the alleged racketeering activity. 18 U.S.C. § 1964 (c). Causation is an essential element of a RICO action. *Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir. 1991), *petition for cert. filed* (October 15, 1991).

> A plaintiff cannot allege merely that an act of racketeering occurred and that he lost money. He must show a causal connection between his injury and a predicate act. If no injury flowed from a particular predicate act, no recovery lies for the commission of that act.

*Pelletier v. Zweifel,* 921 F.2d 1465, 1497 (11th Cir. 1991).

> Conducting an enterprise that affects interstate commerce is obviously not in itself a violation of § 1962, nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, '[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.'

*Sedima, S. P. R. L. v. IMREX Co.*, 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), *citing Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). The plaintiff's injury must have been proximately caused by the commission of the predicate acts. *Pelletier*, 921 F.2d at 1499. The Eleventh Circuit has taken the more restrictive view of the proximate cause requirement, holding that a plaintiff has standing to sue under section 1964 (c) only if his injury flowed directly from the commission of the predicate acts. *Id.*

There is a substantial amount of evidence in the record tending to prove that the concessions in the FWA were caused by the economics of the steel industry in 1983.[46] The Union points to evidence in the record that: (1) at the time of the negotiations, the Fairfield Works

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[46] The Union and USX argue the concessionary Fairfield Works Agreement did not injure plaintiffs because it was the vehicle for reopening the Works and returning the plaintiffs to their employment. The agreement did, however, include a considerable number of concessions by the Union. Plaintiffs' return to work under less favorable conditions constituted an injury to their business or property sufficient to satisfy RICO requirements, if plaintiffs could show they would have returned to work under a less concessionary agreement absent the RICO violations. However, as discussed below, plaintiffs have produced no evidence of a causal connection between the concessions and the predicate acts.

had been shut down for more than a year because USX had been losing money in operating the plant (USWE 189-90, 257-58, 269-73, 355-59, 480-96, 537-38); (2) the Company decided and informed the Union negotiators that concessions and changes in operations were necessary to reopen the Fairfield Works (USWE 259-60, 292-97, 336-38, 352-59, 365-66, 497-501, 514-15, 531-36); (3) USX negotiators and officials thought Rich and Phillips bargained well on behalf of the Union (USWE 280, 339-42, 365-68, 428-29, 532); (4) the final agreement was more favorable for the Fairfield workers than the Company originally had been prepared to accept (USWE 274, 339-41, 365-66, 421-23, 428, 505-06, 509-10, 530, 542-43); (5) under the agreement, many workers were offered either a job or a special early pension, and USX agreed to make capital investments to modernize the plant (USWE 193-94, 196, 202-04, 206-07, 282-83, 421-23, 471-75); (6) the Union negotiators were told if an agreement was not reached Fairfield would be among the plants USX closed permanently on December 27, 1983 (USWE 440, 444-45, 449, 453-54, 536-37); (7) on December 1, 1983, USX sent a letter to each bargaining unit employee at Fairfield warning that permanent closure of the plant was imminent if the Union would not agree to concessions (USWE 119-22); (8) three days after the Fairfield Agreement was signed, USX finally closed twenty to thirty steel making facilities (USWE 125-28, 281, 369, 418-19, 502-04, 506-08, 538, 546); (9) Fairfield was a candidate for permanent closure during USX's 1983 restructuring of its Steel Division (USWE 195, 261, 271-72, 355-56, 358, 361-63, 367-71, 419, 431-32, 511-12, 516-17, 546); (10) USX continued to lose money at Fairfield after the plant reopened (USWE 278-79, 370); (11) discussion of the leaves of absence and pension credits was not a significant point in the negotiations, a total of twenty to twenty five minutes were spent discussing the leaves of absence and pension credits during the three months of the Fairfield negotiations

(USWE 310-11, 317-18, 321-26, 452, 469-70); (12) the Company and Union negotiators did not consider the matter part of the Fairfield negotiations (USWE 310-18, 321-23, 326-29, 332-33, 401-02, 420, 430, 446-47, 450-51, 519-20, 543-44); (13) the Company negotiator, Miller, and the Union negotiator, Rich, testified Phillips and Rich never offered to give anything in exchange for the pension benefits, did not make any terms of agreement conditional on pension benefits, and did not trade anything for them (USWE 416-17, 420, 424, 430, 476-77); (14) on the final day of negotiations, December 24, 1983, the agreement was in final form before the Union negotiators again raised the issue of the pensions (USWE 298-302, 330-34, 341-42, 403-13, 455-63, 539-42); (15) the Company negotiators told Rich they would not deal with the pension matter in connection with the Fairfield negotiations, but would "consider" it at a later date if it were raised by the International Union (USWE 275-77, 302-08, 415-16, 466-67); and (17) the negotiators testified that the terms of the agreement were not affected by the promise to consider the pension issue (USWE 416-17, 420, 425-26, 430, 468-69).

Plaintiffs did not point to any evidence conflicting with the Union's evidence, but argue: (1) the jury could infer from the evidence that the defendants' conduct created a conflict of interest which subverted the loyalty of the negotiators, and plaintiffs had a property interest in their right to the honest and faithful services of the Union negotiators; (2) the jury could infer from the evidence that USX expected to receive and did receive a *quid pro quo* for the leaves of absence and pension benefits given to the Union negotiators; (3) the jury could infer from the evidence that the concessions in the Fairfield Works Agreement were proximately caused by the predicate acts; and (4) the jury could infer from the evidence that the agreement would have been better but for the Union negotiators' conflict of interest.

The drawing of inferences from the facts is the function of the jury, and therefore all reasonable inferences are to be drawn in the favor of the party opposing summary judgment. *Anderson v. Liberty Lobby,* 477 U.S. at 255. However, the nonmovant need not be given the benefit of every inference, but only of every reasonable inference. *Brown v. City of Clewiston,* 848 F.2d at 1540 n. 12. Summary judgment is proper where the inferences the nonmoving party presses are not plausible. *Id.*

Plaintiffs first argue the jury could infer from the defendants' conduct that they were injured by a conflict of interest which subverted the loyalty of the Union negotiators. They claim the Union negotiators' request for pensions and the Company's payment of pensions created a conflict of interest for the Union negotiators which injured a property interest in their right to the honest and faithful services of Union officials.[47]

Plaintiffs have never before advanced this theory of injury. In the pretrial order entered by Judge Guin on November 2, 1989, plaintiffs claimed the Union negotiators agreed to concessions in the Fairfield Works Agreement in return for the leaves of absence and pension benefits and "as a direct result of the concessions made by the Union in the negotiations of the December 24, 1983 Fairfield Works Agreement, plaintiffs lost jobs, compensation, and other employee benefits, and a number of pending grievance and arbitration proceedings were dismissed." Order of Hon. J. Foy Guin, Jr., entered November 2, 1989. In their First Amended (And Substituted) Complaint, the plaintiffs claimed they were in-

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[47] In *United States v. Local 560 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,* 780 F.2d 267 (3rd Cir. 1985), the Third Circuit concluded that Union members have protectible property interests in their rights incident to Union membership. *Id.* at 281-82. The Union has not challenged that holding, but agrees that denial of such intangible rights is not the sort of injury to "business or property" that triggers standing under 18 U.S.C. § 1964.

jured by the concessions in the FWA. Complaint of February 28, 1989, para. 72, 73. The plaintiffs have since amended their complaint, but did not add allegations that they were injured by the loss of the honest and faithful services of the Union negotiators. Plaintiffs' Second Amended Complaint, filed January 8, 1991. Plaintiffs cannot escape the binding effect of the pretrial order by raising new issues in a response to the defendants' motion for summary judgment. *Beavers v. American Cast Iron Pipe Co.*, 751 F.Supp. 956, 964, n. 7 (N.D. Ala. 1990).

Additionally, the Union argues the alleged injury, denial of plaintiffs' right to the "honest and faithful services of Union officials," is not the sort of injury to business or property RICO was intended to remedy. RICO's civil action provision, 18 U.S.C. § 1964(c), was patterned after the Clayton Act, 15 U.S.C. § 15, and cases interpreting the meaning of "business or property" in the Clayton Act context are applicable in the context of RICO's civil action provision. *See, Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150-51, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 103 (2nd Cir. 1990). RICO and the Clayton Act "aim to compensate the same type of injury; each requires that a plaintiff show injury in his business or property by reason of a violation." *Malley-Duff*, 483 U.S. at 151 (citations omitted). In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979), the Supreme Court noted that "[o]n its face, § 4 [of the Clayton Act] contains little in the way of restrictive language." *Reiter*, 442 U.S. at 337. The *Reiter* court rejected the argument that the section 4 remedy was available only to redress injury to commercial interests. In that case, the court afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer had standing to seek a section 4 remedy reflecting the increase in the purchase price of goods that was attributable to a

price-fixing conspiracy. *See Blue Shield of Virginia v. McCready,* 457 U.S. 465, 473, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). In *McCready,* the court noted that ". . . while 'difficulty of ascertainment [should not be] confused with right of recovery,' . . . § 4 [of the Clayton Act] plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at the bottom on some abstract conception or speculative measure of harm." *McCready,* 457 U.S. at 475, n. 11. Plaintiffs have cited no case in which the alleged RICO injury was found to consist of damage to an intangible property interest in "honest and faithful" services such as they claim here. In view of the requirement that plaintiffs suing under the Clayton Act must prove a "tangible economic injury," and the recognition that RICO's civil remedy provision is patterned after the Clayton Act, the court finds that plaintiffs' claimed deprivation of the "honest and faithful services of Union officials" is not the sort of injury to business or property RICO was intended to remedy.

Second, plaintiffs argue the jury could infer that USX expected to receive something in return for the pension benefits given to the Union negotiators. Plaintiffs claim that Rich and Phillips implemented the FWA and were involved in grievance and arbitration proceedings which arose at the Fairfield Works.[48] Because Rich and Phillips were influential at Fairfield, plaintiffs argue, the jury could infer that USX gained the Union's cooperation in the implementation and administration of the FWA when it paid pensions to the Union negotiators. However, the

[48] As noted above, plaintiffs have presented no evidence that Rich and Phillips were involved in grievance and arbitration proceedings, they have established only that the Fairfield Plant Manager, Stevenson, dealt with Rich and Phillips with regard to "local issues." Mr. Stevenson did not define what he meant by the term "local issues." (PA 232-36, 405-06). The Union has not, however, disputed plaintiffs' characterization of Rich and Phillips' role at Fairfield.

plaintiffs have presented no evidence that Rich and Phillip's actions in connection with implementing the FWA were influenced by their relationship with USX or that Rich and Phillips implemented the FWA so as to injure plaintiffs. Plaintiffs have claimed and attempted to prove that they were injured by concessions made in the FWA, not by the implementation of the FWA. Plaintiffs must have evidence of an injury flowing directly from the commission of the predicate acts, and they have no evidence that they were injured by Rich and Phillips' implementation of the FWA because they were receiving pensions from USX in violation of section 186. Plaintiffs cannot satisfy their burden of proving causation by proving racketeering activity and claiming that there *must have been* an injury therefrom.[49]

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[49] Plaintiffs quote from *Kemler v. United States*, 133 F.2d 235, 238 (1st Cir. 1942), in support of their claim that the jury could infer USX received something in return for the payment of pension benefits to the Union negotiators. In *Kemler*, the court had evidence before it that the defendant offered to pay a Selective Service examining physician if the physician would certify that defendant's heart was weak. The defendant argued that he would have been legally justified in not presenting himself for physical examination because he had not been reclassified as 1-A. The court said the gravamen of the offense was the giving or offering of a bribe to a person acting on behalf of the United States for the purpose of influencing official conduct and "no one would give or offer a bribe unless he expected to gain some advantage thereby," so that it made no difference if the doer discovers later that there was no occasion for him to have done it. Plaintiffs here are not trying to prove intent to influence, but an injury. It is one thing to infer from the offer of a bribe that the offerer had an intent to influence; it is quite another to infer that he did, in fact, succeed in influencing the conduct of the recipient and that the conduct of the recipient injured the plaintiffs.

Neither does *Continental Management, Inc. v. United States*, 527 F.2d 613, 618-19 (Ct.Cl. 1975), help the plaintiffs. In *Continental*, the government claimed a third party who had bribed government VA and FHA employees was liable to the government for the amount of the bribes. The government could prove injury caused by the bribery, including, *inter alia*, the generalized injury

Third, plaintiffs contend the jury could infer from the evidence that the concessions in the FWA were proximately caused by the section 1962 violations. (Plaintiffs' Brief, pp. 26-32). Plaintiffs point to evidence that: (1) the leaves of absence issue was discussed secretly; (2) Rich gave Miller the request for leaves of absence early in the negotiations; (3) in an October 27 meeting, Rich said the pensions were a "condition of settlement"; (4) Miller told Roderick, Graham and Johnston in December 1983 that the pension issue was an "open item"; (5) on December 24, 1983, Rich and Phillips refused to sign the "completed typed FWA" until they had their answer on the pensions; (6) the pensions were kept confidential within USX; (7) upon Rich and Phillips' refusal to sign, Miller called Johnston and obtained a specific and detailed outline of the conditions under which the Company would consider granting the leaves of absence and pensions; (8) Rich and Phillips did not sign the FWA until after Miller told them he was of the impression that USX would favorably consider their request; (9) Johnston wrote a July 1984 memo to Miller, in which he asked "are we in jeopardy of losing our momentum with E.B. and Thermon," and Miller's responded that USX's handling of the pension request was the "thing they have

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of diminution of the public confidence, and specific injuries such as payment to an employee to "assign the 'right appraiser'" and payment to a government employee for "help on escrow problems." *Continental*, 527 F.2d at 618. Since the government could not prove the amount of damages, the court found the amount of the bribe provided a reasonable measure of damage, citing *Kemler* for the proposition that the offerer of a bribe expects to get something in return. *Continental* is inapposite since the plaintiff there had proved injury caused by the bribe, and the only question before the court was the amount of damage. Additionally, the damages in *Continental* were the amount of the bribe only, not the treble RICO damages sought by plaintiffs here. Plaintiffs cannot satisfy their burden of proving the RICO violation caused their injury merely upon proof of the RICO violation, in view of the requirement that they prove both racketeering activity and causation. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991).

their eye on"; (10) the leaves of absence policy adopted by the Corporate Policy Committee on October 22, 1984 were made retroactive to March 1, 1984, because "a commitment was made" that the pensions would start then, according to Short; and (11) the stated purpose for the policy was to promote the goodwill of former employees who worked for the Union.

Considering this evidence in the light most favorable to the plaintiffs, the jury could find the pension issue was the subject of secret discussions several times during the FWA negotiations and that Rich considered the pensions a condition of settlement, but USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign. There is also some evidence from which the jury could infer that USX "committed" to providing the pensions, and that USX intended to influence Rich and Phillips in some manner.

There is no indication or evidence that the negotiators on either side were swayed by their outstanding request for pensions while they negotiated the terms of the agreement. In light of the undisputed evidence that the FWA was never changed after USX promised to consider the pension issue, the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA.[50]

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[50] Plaintiffs have not disputed the defendants' claim that the agreement was not changed after Rich and Phillips made their demand for pensions on the final day of negotiations. Plaintiffs have a pending motion requesting that the court stay disposition of the summary judgment motions pending resolution of the interlocutory appeals of discovery issues presently before the Eleventh Circuit. As the court noted earlier in this opinion, the court has considered plaintiffs' lack of discovery where the plaintiffs have specifically demonstrated that further discovery might lead to evidence which would preclude summary judgment. However, plaintiffs have not claimed they might find evidence that the FWA was changed in response to Rich and Phillips' demand, nor have they

More importantly, in view of the additional undisputed evidence that the concessions resulted from the need to make the Fairfield Works profitable before it was reopened, the jury could not soundly infer that it was more likely that the concessions resulted from the bribery of Union officials than from economic necessity.[51] From the evidence plaintiffs presented, a jury could only speculate about USX's motives in giving pensions to Union officials. There is no evidence from which the jury could conclude USX obtained the FWA concessions as a result of paying Union officials pensions. Plaintiffs' invitation to assume that the concessions must have been the result of bribery is not sufficient where the concessions could just as likely have resulted from the need to make Fairfield economically viable. Again, plaintiffs ask the court to find that the proof of an act of racketeering and an injury is sufficient to establish their *prima facie* case. There must be some substantial evidence of a causal connection between the predicate act and the injury. *Pelletier,* 921 F.2d at 1497. There is none here.

Plaintiffs also argue the jury could infer that the FWA would have been more beneficial for them absent the

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argued that the outstanding discovery might provide them with information which would lead to evidence of causation. In view of the extensive discovery plaintiffs have already obtained, and their failure to specify that further discovery would lead to evidence which would preclude summary judgment based on causation, the court finds summary judgment on this question proper. *See, e.g. Avirgan v. Hull,* 932 F.2d 1572, 1580 (11th Cir. 1991).

[51] On proof of causation, *Prosser and Keeton on Torts* provides:

> The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on Torts, § 41, p. 269 (5th ed. 1984).

Union negotiators' conflict of interest, citing *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533, 543, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943). In *Virgina Electric,* the Supreme Court was reviewing a decision of the N.L.R.B. ordering a company to reimburse the dues its employees were required to pay to a company-dominated uinon. The court, considering the argument that the company-dominated union had produced some benefits for the employees, upheld the Board's decision, noting it was "manifestly impossible to say that greater benefits might not have been secured if the freedom of choice of a bargaining agent had not been interfered with." *Id.* at 544. However, the court specifically noted the Board's reimbursement order was not a redress for a private wrong, but a remedy created by statute. *Id.* at 543. The court therefore noted it was "wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained." *Id.* Plaintiffs here have no such relief from their common law requirements, and, again, they have the burden of proving the RICO violation caused their injury. *Avirgan,* 932 F.2d 1572. Causation is a separate and distinct element of a *prima facie* RICO case. *Avirgan,* 932 F.2d at 1577.

Because plaintiffs do not have evidence that their injury was caused by the RICO violations, the Union is entitled to summary judgment on Count I of plaintiffs' complaint.

B. The Company and the Fund.

The Company and the Fund (hereinafter "USX") filed their motion for summary judgment claiming, as to plaintiffs' RICO counts, that plaintiffs cannot demonstrate an injury proximately caused by racketeering activity, and

that plaintiffs cannot demonstrate a "pattern" of racketeering injury.[62]

1. Pattern of Racketeering Activity.

USX argues plaintiffs have no proof defendants engaged in a pattern of racketeering activity. It points out that plaintiffs have alleged violations of section 186 as predicate acts, and claims the only evidence of section 186 violations are USX's promise to give Union negotiators leaves of absence with attendant pension benefits and the actual payment of the pension benefits. Proof of a "pattern of racketeering activity" requires a showing of at least two predicate acts within a ten year period. 18 U.S.C. § 1961(5). While two predicate acts are necessary they may not be sufficient, since two of anything do not generally form a "pattern." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

*Sedima*, 473 U.S. at 496, n. 14 (emphasis in original). The element of relatedness is satisfied upon proof that the criminal acts have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239-40, 109 S.Ct.

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[62] Like the Union, USX argues that it cannot be both the "enterprise" and the defendant under 18 U.S.C. § 1962(c). As noted above, this court will follow existing Eleventh Circuit precedent and hold, therefore, that the enterprise and the defendant may be one and the same under Section 1962(c). *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982).

2893, 106 L.Ed.2d 195 (1989). Proof of relatedness is not sufficient to establish a pattern, however; plaintiffs must also show a continuity of racketeering activity, or its threat. *H.J. Inc.*, 492 U.S. at 241. Continuity refers either to a closed period of repeated conduct, or to past conduct that by its nature projects a threat of repetition in the future. *Id.*, *Bivens Gardens Office Bldg. Inc. v. Barnette Bank of Florida, Inc.*, 906 F.2d 1546, 1555 (11th Cir. 1990). "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* at 242. Where a RICO action is brought before continuity can be established, liability depends on whether the threat of continuity is demonstrated. *Id.* Proof that a defendant has been involved in multiple criminal schemes would be highly relevant to the inquiry into the continuity of the defendant's racketeering activity, but continuity need not be shown only by proof of multiple schemes. *H.J. Inc.*, 492 U.S. at 240.

The defendants contend that the alleged bribe was a discrete act which occurred sometime during the 1983 negotiations of the FWA, a "single-shot, uncomplicated, 'garden-variety' bribe." USX's Memorandum in Support of Summary Judgment, dated January 15, 1991, p. 14. Plaintiffs argue they have established a pattern of racketeering injury with proof that: (1) the "negotiations regarding the Fairfield Works Agreement did not conclude until November 1984"; (2) Rich and Phillips implemented and interpreted the FWA and processed grievances and arbitrations, while they were "on the Company's payroll"; and (3) the monthly payments continued from December 1984 until May 1988.

The FWA negotiations commenced on or about July 1, 1983, and were completed on December 24, 1983. There is no support in the record for plaintiffs' claim that nego-

tiations continued after the agreement was signed on December 24, 1983.[53]

Plaintiffs accuse Rich and Phillips of being "on the Company's payroll" while the FWA was implemented without articulating any theory of how this evidence shows further section 186 violations. Plaintiffs have not pointed to any evidence of improprieties in the implementation and interpretation of the FWA, or to evidence of improper handling of grievances or arbitration proceedings. Plaintiffs must present evidence that defendants committed sufficient section 186 violations to satisfy the RICO "pattern" requirement. Proof that Rich and Phillips implemented the FWA does not show USX committed further section 186 violations. If plaintiffs had presented evidence that Rich and Phillips wrongfully implemented the FWA to favor USX, a jury could infer therefrom that the pension payments were separate bribe payments. There is, however, no evidence of wrongdoing in connection with the implementation of the FWA. Plaintiffs must show at least two related racketeering predicate acts that amount to, or threaten the likelihood of, continued criminal activity. *United States v. Alexander,* 888 F.2d 777, 778 (11th Cir. 1989).

Finally, plaintiffs argue that the mailing of monthly payments under the pension plan from December 1984 through May 1988 satisfied the RICO pattern requirement. Acts that are part of the same scheme or transaction can qualify as distinct predicate acts. *H.J. Inc.,* 492 U.S. 229 (1989); *Bank of America Nat'l Trust and Savings Ass'n v. Touche Ross and Co.,* 782 F.2d 966 (11th Cir. 1986). If separate statutory violations are found, the predicate acts will be considered to be distinct irrespective of the circumstances under which they arose. *U.S. v. Gonzalez,* 921 F.2d 1530, 1545 (11th Cir. 1991).

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[53] As noted above, the only evidence plaintiffs cite in support of this claim is testimony about the procedure for implementing the early retirements made available under the FWA.

The plaintiffs contend the monthly mailings of pension benefits each constituted a separate violation of 29 U.S.C. § 186.[54] USX claims that the monthly payments made by the Fund were non-discretionary "ministerial acts" which were compelled by ERISA once the pensions were granted, and that the payments were nothing more than parts of one transaction, indistinguishable from installments of a lump sum amount. USX's Brief, at 16-17.[55] In *United States v. Boffa,* 688 F.2d 919, 934-36 (3rd Cir. 1982), the Third Circuit held that a reasonable jury could find that each of four monthly lease payments, every payment allowing a union official free use of a car for a month, was a violation of section 186. *Boffa,* 688 F.2d at 934.[56] In

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[54] Under 18 U.S.C. § 1961(1)(B), racketeering activity is "any act which is indictable" under various criminal statutes. In their complaint, plaintiffs allege the mailings were separate violations of 29 U.S.C. § 186. (Plaintiffs' Complaint, para. 78). Until this summary judgment motion, plaintiffs had not claimed the mailings were violations of the mail fraud statute. Amendment of pleadings to conform to the evidence should be liberally allowed, Fed.R.Civ.P. 15(b), and proof of uncharged acts are admissible to prove membership in the RICO conspiracy, *U.S. v. Gonzales,* 921 F.2d 1530, 1546-47 (11th Cir. 1991). However, plaintiffs have merely made the allegation that the mailings amounted to mail fraud; they have not presented any evidence in support of that claim. Neither have they alleged or proved that they were injurd in their business or property by reliance on a mail fraud scheme. *Pelletier v. Zweifel,* 921 F.2d 1465, 1499 (11th Cir. 1991).

[55] USX also quotes from the "RICO manual" of the Department of Justice. USX Brief at 17. Although the court was not provided a copy of the manual, the portions quoted purport to require that United States prosecutors allege more than one criminal episode, and, in a bribery case, have evidence that all payments represent individual, separate transactions rather than installments of an agreed-upon overall bribe. *Id.*

[56] *United States v. O'Connor,* 910 F.2d 1466, 1468 (7th Cir. 1990), does not support plaintiffs' claim. The *O'Connor* court had before it that O'Connor provided continuous services in return for continuous payments. There is no evidence here that Rich and Phillips provided USX with service after the FWA was signed. As noted above, plaintiffs have claimed Rich and Phillips implemented the FWA, but made no claim that the FWA was wrongfully implemented in USX's favor.

determining what "thing of value" was given to union officials, the focus must be on what was delivered, and not what was received. *Boffa,* 688 F.2d at 935.[57] Individual payments made pursuant to a single agreement are separate violations. *United States v. Cohen,* 384 F.2d 699 (2nd Cir. 1967). Each payment is a violation of the statute even where it is part of a single course of conduct. *United States v. Donovan,* 339 F.2d 404, 410 (7th Cir. 1964). However, in *Boffa,* the court acknowledged that the jury had to find that each lease payment constituted a "thing of value" before it could conclude the defendants had violated the statute more than once. *Boffa,* 688 F.2d at 936. Proof that the payments were "parts of one transaction, installments of a pre-arranged amount, or the result of a single impulse" would be relevant to the determination of whether the individual pension payments were "things of value." *Donovan,* 339 F.2d at 410. The jury must determine whether the "thing of value" delivered by USX was a pension, or separate monthly pension payments, *Boffa* 688 F.2d at 936, and the court cannot properly make that decision on summary judgment.

However, USX argues that even if each payment was a separate violation of section 186 they do not satisfy the pattern requirement after *H.J. Inc.* Proof that a number of predicate acts occurred over a period of time is not, by itself, sufficient to show a pattern of racketeering activity. A "pattern" is more than just a multiplicity of racketeering predicates; it is an " 'arrangement or order of things or activity.' " *H.J. Inc.,* 492 U.S. at 238. Plaintiffs must show the acts are related one to another and that they amount to, or otherwise constitute a threat of, continuing racketeering activity. *H.J. Inc.,* 492 U.S. at 237-40, *United States v. Kotvas,* 941 F.2d 1141, 1144 (11th Cir. 1991). "Continuity" refers either to a closed

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[57] Indirect payments, such as payments made through a non-employer corporate instrumentality, are within the prohibitions of the statute. *United States v. Overton,* 470 F.2d 761, 765 (2nd Cir. 1972).

period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition. *H.J. Inc.*, 492 U.S. at 241. "[P]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* 492 U.S. at 242. RICO's language should be given its "common sense, every day" meaning. *H.J. Inc.*, 492 U.S. at 241.

Under post-*H.J. Inc.* Eleventh Circuit law, distinct statutory violations are considered to be distinct predicate acts, irrespective of the circumstances under which they arose. *Gonzalez*, 921 F.2d at 1545. Therefore, if the jury should determine that the payments constituted separate violations of section 186, each payment would be a "predicate act" for RICO purposes. In *United States v. Kotvas*, the Eleventh Circuit held the element of continuity was sufficiently addressed where the jury was instructed that it had to find defendant committed two *predicate offenses* which were "connected with each other by some common scheme, plan or motive so as to be a pattern of criminal activity and not merely a series of separate isolated or disconnected acts." *Id.* at 1144. The court specifically found the instruction addressed the *H.J. Inc.* "continuity" element. *Id.* A jury could find from the evidence presented here that the payments were individual violations of section 186 and were connected by a common scheme, plan, or motive. That is all the Eleventh Circuit requires the plaintiff prove in establishing "continuity" after *H.J. Inc. Kotvas*, 941 F.2d at 1144.[58]

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[58] **USX has cited several cases from the Seventh and Third Circuits in support of its argument that the plaintiffs have not prepresented evidence of a pattern of racketeering activity. The Eleventh Circuit has not directly addressed these arguments, but it has, in *Kotvas*, defined a significantly more relaxed view of the post-*H.J.* pattern element.**

Furthermore, there is other evidence of a pattern of racketeering activity in the record which plaintiffs have not relied upon, but which the court must consider. There is evidence tending to show: (1) USX did not rebuff the Union negotiators when they requested pensions during the negotiations, and they thereafter took steps to examine the possibility of granting the pensions (PA 100a-100h, 169-71); (2) on December 24, 1983, USX promised to "favorably consider" the pension request under certain specified conditions which had been outlined by Bruce Johnston (PA 101-104); (3) USX committed to giving the Union officials pensions retroactive to February 29, 1984 (PA 420, 323, 324); (4) USX changed its leave of absence policy on October 22, 1984, making it possible for some Union officials to receive leaves of absence (PA 421-22, 425); (5) USX approved requests for leaves for six Union representatives at Fairfield (PA 436); (6) On September 27, 1984, USX's executive Vice President, Employee Relations, J. Bruce Johnston, recommended the six Fairfield Union officials receive pensions from the Fund "in accord with the December 24, 1983 agreement between the Company and the USW at Fairfield Works" and E. B. Rich was, on October 23, 1984, invited to submit a "final list of names" of those who desired pensions (PA 305, 308); (7) in November 1984, the Fund gave pensions to the Fairfield Union officials (PA 300-02, 330-32, 340-41, 353-54, 372, 376); and (8) in addition to pensions, the Union officials received health insurance and life insurance. (PA 300, 302, 330, 332, 340, 342, 353, 354, 376). From this evidence, a jury could find a number of violations of section 186 extending over an eleven month period.[59] Although the evidence

[59] In *H.J. Inc.*, the Supreme Court said a plaintiff may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time; predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. *Id.*, 492 U.S. at 242. A reasonable jury could find that USX engaged in a pattern of racketeering activity under this formulation.

conflicts, plaintiffs have presented some evidence that USX agreed to pay the Union negotiators pensions as early as December 24, 1983. PA 305, 308. If USX had not arranged for the Union officials to receive pensions, the mere agreement to give the Union officials pensions would have been a violation of section 186. 29 U.S.C. § 186(a). The jury may also find USX violated section 186 when it approved the leaves of absence for the six Fairfield union officials, when it recommended the six officials receive pensions from the Fund, or when the Fund gave the union officials life and health insurance. Each of those actions could be found by a reasonable jury to be a "thing of value" which USX agreed to give or gave to the union officials. 29 U.S.C. § 186; *See United States v. Cervone,* 907 F.2d 332, 347 (2nd Cir. 1990) (statute's language indicates a tangible item or valuable services or entitlements). The statute condemns the agreement and "likewise makes each receipt or acceptance a separate crime." *United States v. Cohen,* 384 F.2d 699, 700 (2nd Cir. 1967).

2. Injury.

USX also claims the plaintiffs suffered no injury from the concessions in the FWA because plaintiffs would not have been able to go back to work but for the FWA. As discussed above, defendants have presented considerable evidence showing the concessions were necessary due to the economic crisis in the steel industry. Plaintiffs reply that they gave up a number of concessions when they went back to work under the FWA, but they have not presented any coherent response to USX's argument that they were not injured because they got their jobs back under the agreement. However, if one assumes the plaintiffs were injured because they went to work under less favorable conditions than they otherwise might have had, plaintiffs still lack proof that the concessions were caused by the bribery of Union officials. As discussed above, plaintiffs have not presented evidence supporting

their claim that the concessions in the FWA were proximately caused by the bribery of Union officials, and USX and the Fund are, like the Union, entitled to summary judgment on all of plaintiffs' RICO claims.

USX also argues that plaintiffs' RICO claims under § 1962(a) and (b) are defective because plaintiffs have no proof of an "investment injury" under 1962(a) or a "control injury" under 1962(b). USX claims plaintiffs must show they were injured by the investment of money in the enterprise under 1962(a), rather than by the pattern of racketeering activity. Similarly, under 1962(b), USX claims plaintiffs must show they were injured by the defendants' acquisition or maintenance of the enterprise rather than by the pattern of racketeering activity.

The court agrees with the Fourth Circuit's holding on this issue in *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990), and finds that the plaintiff need not show an "investment injury" or a "control injury." Plaintiffs need only show an injury to business or property flowing from the commission of the predicate acts. Particularly, under section 1962(a), there appears to be no basis in the statutory language for finding the defendant's conduct can injure the plaintiff only through the use and investment of racketeering income rather than by the receipt of the income. *Busby*, 896 F.2d at 837. Furthermore, the Supreme Court's broad language in *Sedima*, 473 U.S. 479 (1985) and *American Nat'l Bank & Trust Co. v. Haroco, Inc.*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985) appears to foreclose the defendants' argument. As the *Busby* court noted, although the complaints in *Sedima* and *Haroco* were filed under 1962(c), the cases appear to require a traditional causation analysis in determining whether a RICO plaintiff was injured "by reason of" a section 1962 violation, and they make no distinction between the underlying section 1962 violations. *Busby*, 896 F.2d at 839. Finally, in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991),

the Eleventh Circuit required proof that the plaintiff's injury flowed from the commission of the predicate acts, and made no distinction between the plaintiff's claims under section 1962(c) and his claims under section 1962(a) and (b). *Pelletier,* 921 F.2d at 1495-1499. Although the *Pelletier* court was not directly addressing this issue, the court's application of the *Sedima* causation analysis to the section 1962(a) and (b) claims indicates the Eleventh Circuit would agree with *Busby,* and find that *Sedima's* traditional causation analysis applies, regardless of which section 1962 violation plaintiff alleges.

USX also argues there is no evidence it invested income derived from the bribe in the Fund, the Union, or District 36 of the Union. USX claims the only other alleged enterprise, the Fairfield Works, does not meet the definition of a RICO "enterprise" as set out in 18 U.S.C. § 1961(4).[60] USX claims Fairfield is merely a "plant" or collection of "facilities" or assets, and it argues that such an "inanimate object" cannot constitute a RICO enterprise. Fairly considered, Fairfield Works is more than buildings and assets, it is an ongoing business venture. There is sufficient evidence of record from which a jury could find that Fairfield, although not a legal entity, is a group of individuals "associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Proof of a formal or informal ongoing organization and evidence that the various associates function as a continuing unit satisfies RICO's enterprise element. *United States v. Hartley,* 678 F.2d 961, 988 (11th Cir. 1982) (*quoting United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)).

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[60] That subsection provides:

> '[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. § 1961(4).

In summary, defendants are entitled to summary judgment as to plaintiffs' RICO claims because plaintiffs lack proof that they suffered injury to their business or property caused by the RICO predicate acts.

V. The "Hybrid" Section 301 Claim.

In Count II of their complaint, plaintiffs assert a claim against the Union for breach of its duty of fair representation and a claim against USX for breach of contract, a hybrid section 301 claim.[61] 29 U.S.C. § 185(a). Plaintiffs claim USX breached the March 1, 1983, Basic Labor Agreement and the February 1, 1987, Basic Labor Agreement by entering into the December 24, 1983, FWA and that the Union breached its duty of fair representation "in connection with" the FWA negotiations.

Defendants argue plaintiffs' claim is foreclosed by the applicable statute of limitations. Hybrid section 301 claims are governed by the six-month statute of limitations set out in section 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b). *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).

This action was commenced on December 7, 1988. The FWA was signed on December 24, 1983. The Union

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[61] As noted above, a straightforward section 301 claim involves a union suing an employer for breach of a collective bargaining agreement. In a hybrid section 301 claim, the union member sues his employer for breach of the collective bargaining agreement and contends the union breached its duty of fair representation. *United Paperworks Int'l v. Itt Rayonier*, 931 F.2d at 834 n. 7. To bring a straightforward section 301 claim for breach of contract against his employer, a union member is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. The union member may bring a hybrid section 301 suit notwithstanding the outcome or finality of grievance or arbitration proceedings, but must show not only that the company breached the contract, but that the union breached its duty of fair representation. *Del Costello*, 462 U.S. at 164-65.

claims the six month period must run from the date the FWA was signed since the gravamen of plaintiffs' complaint is that the contract was illegally executed. In *International Ass'n of Machinists, Local No. 1424 v. NLRB*, 362 U.S. 411, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960), the Supreme Court said where a union committed an unfair labor practice in signing a collective bargaining agreement, the section 10(b) limitations period ran from the date the contract was signed, and a continuing violation theory would not be applied to provide that subsequent enforcement of the otherwise valid contract would bring the violation within the limitation period. The court noted that if a continuing violation theory were applied, as long as the contract or any renewal were in effect, the six month period would not begin to run. The result would be to withdraw "virtually all limitations protection from collective bargaining agreements" attacked on the grounds that the contract was executed in violation of the law. *Id.*, 362 U.S. at 425. The *Local 1424* court was not concerned with application of a discovery rule to the section 10(b) period.

The Eleventh Circuit has consistently applied a discovery rule to the section 10(b) limitations period where the alleged violation occurred during a grievance procedure. *See, e.g. Proudfoot v. Seafarer's International Union*, 779 F.2d 1558 (11th Cir. 1986). The Seventh Circuit applies the discovery rule to the section 10(b) limitations period when the violation occurs during negotiations. *Zapp v. United Transportation Union*, 879 F.2d 1439 (7th Cir. 1989). In view of the Eleventh Circuit's consistent application of the discovery rule to the section 10(b) limitation period in cases involving violations occurring during grievance proceedings, the court concludes the Eleventh Circuit would, like the Seventh Circuit, apply the rule in cases involving violations occurring during negotiations. *See Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1106 (2nd Cir. 1991) (limitations

period began to run, at the latest, as of the date the allegedly violative agreement was ratified, by which time the plaintiffs had already begun working under the agreement and were aware of the terms of the agreement); *and see Bowen v. City of New York,* 476 U.S. 467, 480-81, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986) (though social security benefit claimants knew of the denial of benefits, they did not know and could not know the adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge).

Thus, in the absence of fraud or concealment, the six-month limitations period starts running when the plaintiff discovers, or in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation. *Howard v. Lockheed-Georgia Co.,* 742 F.2d 612, 614 (11th Cir. 1984). The court must look to the point in time when plaintiffs either were aware or should have been aware of the injury itself, not to when plaintiffs became aware of one of the injury's many manifestations. *Id.* The issue is normally a question of fact, although in certain instances the issue can be resolved on a motion for summary judgment. *Hill v. Georgia Power Co.,* 786 F.2d 1071, 1075 (11th Cir. 1986). The timeliness of a hybrid section 301 suit must be measured from the date on which the employee knew or should have known of the union's final action or the date on which the employee knew or should have known of the employer's final action, whichever occurs later. *Proudfoot v. Seafarer's International Union,* 779 F.2d 1558 (11th Cir. 1986). In this action, the plaintiffs could not have known they had a legally cognizable injury until they discovered or should have discovered that the concessions in the FWA may have been the result of bribery of the Union negotiators.[62]

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[62] The Union argues the plaintiffs knew of their injury at the time the FWA was signed. The plaintiffs could not have known they

It was not enough, as the Union suggests, that they knew the terms of the agreement at an earlier date. The period begins running when the plaintiff discovered or should have discovered the acts constituting the alleged violation. *Howard*, 742 F.2d at 614.

Plaintiffs have presented evidence tending to show that they had no actual knowledge of the Union negotiators' demand for and receipt of pensions until Judge Bua's opinion in *Toth v. USX Corp.*, 693 F.Supp. 693 (N.D. Ill. 1988) appeared in Fairfield in November 1988. The defendants have not contested this assertion, but claim plaintiffs should have known of their cause of action long before November 1988.

Defendants point out that the claims which are the subject of this lawsuit were a matter of public record in October 1986, when union official Emmett Bruce Thrasher sued USX and the Union for Company pension benefits, alleging E.B. Rich told him that pension credits for five union officials would be a prerequisite to a successful Fairfield agreement. *Emmett Bruce Thrasher v. United Steelworkrs of America, et al.*, CV 86-C-1930-S. Complaint filed October 16, 1986, para. 15-17, USXE Tab 13.[63] Thrasher alleged that the settlement to the "pipe mill agreement" included pension credited service for Rich, Phillips and others. *Id.* at para 29-30. In 1988, James Summerville and George Elliot sued the Union,

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had a legal cause of action until they knew the injury was somehow connected to the defendants' actions. In *Gvosdenovic* and *Zapp*, the plaintiffs knew of the alleged misdeeds at the time the contract was signed, and the courts said the plaintiffs could show they had not discovered their injury only if they could present proof that they did not know of the existence of the contract. 'In this action, the plaintiffs are not claiming the Union breached its duty of fair representation by making unnecessary concessions in the FWA, but that the Union breached its duty by making concessions in exchange for pensions.

[63] The Company's submission of evidence in support of its motion for summary judgment will be referred to herein as "USXE."

USX and the Fund for pension benefits, claiming the settlement of the pipe mill agreement included pension credited service for the same union officials. *James Sommerville and George Elliot v. United Steelworkers of America, et al.*, CV 88-G-0105-S. Complaint filed January 21, 1988, para. 21, USXE Tab 14. Additionally, USX and the Union were sued in the Northern District of Illinois for pension benefits under the leave of absence policy in question. *Toth, et al. v. USX, et al.*, 88 C 2135, USXE Tab 15.[64] Defendants claim the plaintiffs are charged with knowledge of these public documents.

The defendants, as the moving parties, have the burden of demonstrating that there is no genuine issues of material fact as to the due diligence question. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1171 (5th Cir. 1979); *Coats & Clark*, 929 F.2d 604. The movant may meet its burden by pointing to materials on file that demonstrate the party bearing the burden of proof at trial will not be able to meet that burden. *Coats & Clark*, 929 F.2d at 608. Therefore, though plaintiffs have the ultimate burden of proving they were diligent in pursuing their claims, on this summary judgment motion the defendants have the burden of showing the absence of a genuine issue as to the plaintiffs' knowledge, actual or constructive, of their claim. *Beef Industries Litigation*, 600 F.2d at 1170. *Celotex* did not, as the Union suggests, shift the initial burden on summary judgment to the non-movant. *Coats & Clark*, 929 F.2d at 608, Union brief at 38.

Plaintiffs are chargeable with knowledge of the contents of public records notwithstanding the evidence that they had no actual knowledge of the previously filed

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[64] USX claims *Toth* was commenced in March 1988; however, the filing stamp on the complaint USX submitted into evidence is illegible.

actions. *Beef Industries Litigation*, 600 F.2d at 1170.[65] However, plaintiffs are charged with constructive knowledge of the allegations in the previously filed suits only. As the *Beef Industries* court noted, knowledge of the allegations in the suit is not the same as knowledge of evidence which would tend to support the plaintiffs' claims. *Id.* at 1171. However, knowledge of the allegations did put plaintiffs to a duty to investigate. *Id.* Nevertheless, on this summary judgment motion defendants have the burden of showing plaintiffs would have discovered adequate grounds for filing suit if they had investigated the allegations with reasonable diligence. *Id.* Only after defendants have met their burden are plaintiffs required to show that they did investigate with reasonable diligence and found nothing. *Id.*

The defendants have presented evidence which they claim shows that, had plaintiffs investigated the allegations in the lawsuits, they would have found persons who suspected Union officials were receiving pensions from the Company as a result of the FWA. At his June 1989 deposition, James Summerville testified that there were "a lot of people that knew it or thought they knew it" before July 31, 1987. USXE Tab 16. Trevor Tidwell testified in the criminal action that he learned from Ralph Gurley in 1985 that Gurley was receiving a pension from the Company. USXE Tab 18. Richard Jones testified he

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[65] Contrary to plaintiffs' claim, the conclusion that they are chargeable with constructive knowledge of the contents of the public records in *Thrasher* and *Sommerville* is not inconsistent with the Union's claim that the existence of those public records is not proof that the Union knew that Rich and Phillips exchanged concessions for pensions. Knowledge that Rich and Phillips exchanged pensions for concessions cannot be imputed to anyone from the allegations in the lawsuits; the most that can be found from the allegations in the lawsuits is that Rich and Phillips were accused of taking pensions from the Company. The records, however, were sufficient to put plaintiffs on notice that they may have had a claim against the Company and the Union which should have caused them to investigate had they acted with due diligence.

heard staff reps were getting Company pensions, and though Rich denied it, Jones told others he had a "gut feeling" that people had gotten pensions out of the FWA. USXE Tab 19.

The Company and the Union submitted evidence that Rich and Phillips' pensions were discussed at a local union meeting attended by several union members, in April 1986. At the meeting, Frank Williams declared that Rich and Phillips were receiving Company pensions, and a heated discussion ensued. Fred Gipson affidavit, USWE 185-87; Jackie Davis affidavit, USWE 182-84; John Wilson testimony, USXE Tab 17. Richard Jones called E. B. Rich. USXE Tab 17, Tab 19. Mr. Jones testified that Rich denied the Union officials were receiving pensions, but said they were being "worked on." USXE Tab 19.

USX also submitted a pension application it received in April 1987 from Carl P. Alessi of Indiana, wherein Mr. Alessi requested a pension under the 1984 policy and stated that he knew Union officials at Fairfield had received leaves under the policy. USXE Tab 20. The defendants also point to evidence that there was "talk" about the pensions in and about the Union hall as early as 1986, and the Union points to evidence that members of the plaintiff class were suspicious that they had been "sold out" during the FWA negotiations.[66]

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[66] Defendants also argue that plaintiffs filed suit within a month after reading Judge Bua's opinion in *Toth*, 693 F.Supp. 693 (N.D. Ill. 1988), and point out the *Toth* plaintiffs made allegations similar to those in *Thrasher* and in *Sommerville*. However, the defendants have not shown that the public records in all those cases were similar. The court has no evidence before it about the content of the public record in *Thrasher* and *Sommerville*, other than the complaints submitted in this case by the defendants. As noted above, the *Thrasher* and *Sommerville* complaints were sufficient to put the plaintiffs on inquiry notice, but did not alone constitute sufficient basis for them to file suit. Although Judge Bua rendered his opinion in *Toth* on motions to dismiss, it appears from his

As noted above, defendants have the burden of showing plaintiffs would have discovered adequate ground for filing suit if they had investigated the allegations with reasonable diligence. *Beef Industry Litigation,* 600 F.2d at 1171. Defendants' evidence that plaintiffs would have discovered talk, supposition, and rumor about the pensions is not sufficient to establish that plaintiffs would have discovered adequate grounds for suit if they had investigated the allegations. Defendants have, therefore, not carried their burden of showing there are no genuine issues of fact as to the due diligence question.

Plaintiffs also claim the statute was equitably tolled from the date the FWA was signed, on December 24, 1983, to the date Judge Bua's opinion in *Toth v. USX Corp.,* 693 F.Supp. 693 (N.D. Ill. 1988) appeared in Fairfield. The Union claims the doctrine of equitable tolling does not apply to hybrid section 301 claims in view of the Eleventh Circuit's decision in *Hill v. Texaco, Inc.,* 825 F.2d 333 (11th Cir. 1987). In *Hill,* the court said that equitable tolling principles are read into federal statutes of limitations, but cannot be applied in the face of contrary congressional intent. *Id.* at 334. Therefore, the court held it would not apply the doctrine of equitable tolling where the statute provided that the action had to be commenced within one year of the violation. *Id.* The *Hill* court said equitable tolling applied where the statute explicitly spoke to starting the limitations period upon discovery of the violation or to starting the period when the cause of action accrued. *Id.* at 334-35. The Union points out that section 10(b) provides that

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**opinion that the record, had plaintiffs examined it, would have contained evidence of the leave of absence policy and the letter to Lynn Williams. The *Toth* record, therefore, may have provided plaintiffs with sufficient basis for filing suit. *Toth,* 693 F.Supp. at 695. Without evidence regarding the content of the *Thrasher, Sommerville* and *Toth* public records, the court cannot say that plaintiffs could have found a basis for filing suit from the *Thrasher* and *Sommerville* public records.**

"no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . ." 29 U.S.C. § 160(b). Despite the similarity between the section 10(b) language and the statutory language at issue in *Hill,* the Eleventh Circuit has consistently stated that the 10(b) limitations period starts upon discovery of the violation, or on the date the plaintiff should have discovered the violation. *See, e.g. Howard,* 742 F.2d at 614; *Proudfoot,* 779 F.2d at 1559; Samples, 755 F.2d at 887. Therefore, the court finds that the Eleventh Circuit would most likely find that equitable tolling principles apply to the section 10(b) statute of limitations. Furthermore, as the court in *Hill v. Georgia Power* noted, the *Del Costello* court expressly recognized the possibility of tolling the six-month period when it remanded one of the two cases before it for consideration of Del Costello's tolling argument. *Id.,* 786 F.2d 1071, 1076 (11th Cir. 1986), *citing Del Costello,* 462 U.S. at 172. Accordingly, plaintiffs may assert a claim that the section 10(b) limitations period was equitably tolled.

To prove the statute was equitably tolled, plaintiffs must show defendants took affirmative steps to conceal the cause of action. *Hill v. Texaco,* 825 F.2d 333, 335 (11th Cir. 1987). Alternatively, plaintiffs may present proof that the defendant had a fiduciary responsibility to make disclosure or that the wrong was self-concealing. *Id.* at 335 n. 2.[67]

The Union argues that it did not fraudulently conceal the plaintiffs' cause of action, because it could not con-

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[67] In every case, plaintiffs must also show they exercised due diligence to discover the cause of action within the limitations period. *Hill,* 825 F.2d at 335. "Any fact that should excite [plaintiff's] suspicion is the same as actual knowledge of his entire claim." *Id.* at 335 (citations omitted). As noted above, whether plaintiffs acted with due diligence is a question of fact for the jury and defendants have not carried their burden on summary judgment of proving there is no genuine question of material fact as to that issue.

ceal what it did not know, and there is no evidence that Rich and Phillips traded concessions for pension benefits. It points to evidence that the FWA negotiators have consistently denied the concessions were made in exchange for the pensions. The Union cites no authority in support of its underlying premise that plaintiffs must prove the Union concealed all of the operative facts before the Union is foreclosed from relying on a statute of limitations defense. The jury might find the Union could not assert a statute of limitations defense where it fraudulently concealed information about part of plaintiffs' claim.

The Union also claims that it did not affirmatively conceal evidence of the pensions. Plaintiffs have come forward with evidence that Rich and Phillips denied receiving Company pensions in conversations with Bruce Thrasher and Richard Jones. PA 544-544d, 558-62.[68] A jury may determine that E.B. Rich and Thermon Phillips were acting, at least in part, on behalf of the Union when they denied receiving pensions from the Company and said that the pension matter had not been resolved.

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[68] The Union argues that Rich's alleged effort to deceive Richard Jones was unsuccessful, pointing to Jones' statement that he had a "gut feeling that the S.O.B.'s had received pensions." PA 560. However, Jones also said "[a]fter I told the Committee about the telephone conversation with E. B. Rich, Frank Williams' statements were passed off by the Committee Members as groundless and without substance." *Id.* Therefore, whether plaintiffs actually relied on Rich's statement is a question of fact for the jury. Furthermore, a jury could conclude the plaintiffs' reliance was reasonable in view of the fiduciary relationship between plaintiffs and the Union. The Union has a statutory duty to fairly represent all of the employees in collective bargaining and in enforcement of the collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Whenever a union is acting in its representative role, it must exercise its discretion with complete good faith and honesty and avoid arbitrary conduct. *Air Line Pilots v. O'Neill*, —— U.S. ——, 111 S.Ct. 1127, 113 L.Ed.2d 51, 62 (1991). A jury, therefore, could find the plaintiffs' reliance on the Union's representations was reasonable in the circumstances.

Finally, the Union argues plaintiffs' duty of fair representation claim must fail on the merits since plaintiffs have presented no proof that the concessions in the FWA were given in exchange for pensions. In their complaint, the plaintiffs charge that the Union breached its duty of fair representation by demanding, accepting, or agreeing to accept long-term leaves of absence and pensions in consideration of concessions to the Company in the FWA. Plaintiffs' Complaint, para. 91.[69] In response to the Union's summary judgment motion, plaintiffs have not asserted any other basis for their claim that the Union breached its duty of fair representation. Plaintiffs' Brief, p. 76, 77-92. As noted above, the court can find no evidence of record from which a jury could conclude that the concessions in the FWA were given in exchange for the pensions.[70] Therefore, the Union is entitled to summary judgment on plaintiffs' claim that the Union breached its duty of fair representation. Furthermore in a hybrid section 301 claim, the plaintiff must show the employer breached its contract with the plaintiffs and that the Un-

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[69] Plaintiffs complaint also contains a claim that the Union breached its duty of fair representation by failing to disclose to plaintiffs that Union officials had requested Company leaves of absence during the FWA negotiations and that Union officials had received Company pensions. Plaintiffs' complaint of February 28, 1989, para. 94. That claim was not included in the November 1, 1989, pretrial order and plaintiffs have not pressed it in response to the Unions' assertion that plaintiffs' claim for breach of the duty of fair representation "rests entirely on the allegation that *concessions* were given at Fairfield in exchange for the pensions . . . ." Union brief of January 16, 1991, p. 51. The court has concluded, therefore, that plaintiffs have abandoned this aspect of their claim. Fed.R.Civ.P. 16(e).

[70] The Union presented evidence tending to show that the concessions were the result of economic necessity. The plaintiffs could not present direct evidence that the concessions were exchanged for pensions, but argued that a trade could be inferred from the circumstances. As noted above, in view of the considerable evidence providing an alternative explanation for the concessions, the plaintiffs are not entitled to such an inference.

ion breached its duty of fair representation before it may prevail against either party. *Del Costello,* 462 U.S. at 165. (citation omitted). Thus, the Company is also entitled to summary judgment on plaintiffs' hybrid section 301 claim.

VI. The Unfair Labor Practice Claim.

The plaintiffs claim, in Count III of their complaint, that the Company and the Union failed to negotiate in good faith in violation of 29 U.S.C. § 158(d). Actions under sections 7 and 8 of the National Labor Relations Act, codified at 29 U.S.C. §§ 157 and 158,[71] fall within the exclusive jurisdiction of the National Labor Relations Board.

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . .

*San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 245 (1959); *Johnson v. Pullman, Inc.,* 845 F.2d 911, 914 (11th Cir. 1988). Therefore, the court lacks subject matter jurisdiction of plaintiffs' unfair labor practices claim, and it will be dismissed.

VII. ERISA

A. USX.

The plaintiffs seek a judgment under ERISA directing defendants to reimburse the Fund for the money paid to the Union officials. Plaintiffs' Brief of May 15, 1991, p. 92.[72] Plaintiffs claim USX must refund the money be-

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[71] *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241, 79 S.Ct. 773, 3 L.Ed.2d 775, 780 (1959).

[72] A cause of action for an ERISA fiduciary's breach of its duties arises under 29 U.S.C. § 1109 rather than § 1132(a)(1)(B), and § 1109 does not permit an individual beneficiary to recover dam-

cause it breached its fiduciary duties owed to plaintiffs when it: (1) engaged in a self-dealing transaction with Plan assets in violation of 29 U.S.C. § 1106; (2) represented to the Fund that the six Union officials were entitled to extended leaves of absence; (3) represented to the Fund that the six Union officials were entitled to pensions; and when it (4) directed the Fund to grant pension benefits to the six Union officials.[73]

Under 29 U.S.C. § 1106, a fiduciary is prohibited from engaging in certain transactions. *Id.* Notwithstanding the provisions of section 1106, a fiduciary is not prohibited from being an officer, employee, agent, or other representative of another party in interest. 29 U.S.C. § 1108. "[T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as an employer when not administering the plan or investing its assets." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986). "Business decisions can still be made for business reasons, notwithstanding their collateral effect on prospective, contingent employee benefits." *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989) (*citation omitted*). There is no evidence from which a factfinder could conclude that USX or its officers were acting in their fiduciary capacity when the corporate leave of absence policy was amended. The policy was amended by the Corporate Policy Committee, not by

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**ages for breach of fiduciary duty. *Simmons v. Southern Bell Tel. & Tel. Co.*, 940 F.2d 614 (11th Cir. 1991), *citing Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).**

**[73] Although plaintiffs alleged USX and the Fund failed to notify the Secretary of Labor or the plaintiffs of the modification to the plan, they have denied any reliance on a theory of ERISA liability based on a "failure to notify" in violation of 29 U.S.C. § 1022. Plaintiffs' Brief of May 15, 1991, p. 101.**

the Fund or officers of the Fund. Therefore, USX did not breach a fiduciary duty when it amended its leave of absence policy.[74]

However, USX may have breached fiduciary duties when it caused the Fund to pay pensions to the Union officials based upon the retroactive leaves of absence. A person is a fiduciary with respect to an ERISA plan to the extent he has any discretionary authority or discretionary responsibility in the management or administration of the plan or in the disposition of plan assets, or to the extent he renders investment advice for compensation. 29 U.S.C. § 1002(21). When USX officials acted to cause the Fund to pay pensions to Union officials out of the Plan assets, they were acting in their capacity as fiduciaries to the Plan. ERISA requires a fiduciary to discharge its duties "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). However, the fiduciary must do so "in accordance with the documents and instruments governing the plan. . . ." *Id.* at § 1104 (a)(1)(D). The Plan provides:

> Continuous service shall be broken by . . . absence due to leave of absence which continues beyond the period of leave granted by the Employing Company

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[74] The court recognizes that, in *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), the Eleventh Circuit said "the statutorily imposed fiduciary duty to act solely in the interest of the participants and beneficiaries under ERISA requires trustees who are also officers or agents of a corporation or a union to act with caution in areas of potential conflicts of interest." *Id.* at 580, *citing Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982). The ruling seems to conflict with the holding in *Phillips*, since *Phillips* seems to indicate that no business decision by an employer can implicate fiduciary duties even where the plan is affected. The difference may be that, in *Deak*, the court below had made a finding that the trustees "were using their positions as fiduciaries of the Plan to further goals of the . . . Union." *Deak*, 821 F.2d at 579. This action is more like *Phillips*, in that there is no indication that USX was using its position as fiduciary when it amended the leave of absence policy.

> . . . provided that the continuous service of an Employee shall be broken by any occurrence prior to the effective date of his coverage under these Pension Rules which under pension practices then in effect caused a break.

The Plan, § 5.1(c). Thus, the Plan provides that an occurrence amounting to a break in continuous service "under pension practices then in effect" must remain a break in continuous service. Since the Union officials had already incurred breaks in service under former pension practices, the fiduciaries could not, under § 5.1(c), pay them pensions pursuant to the "retroactive" leaves of absence granted by USX which had the effect of "mending" the break. USX claims that, despite this provision, twice in the past retroactive changes in credited service were made. The evidence USX points to, however, shows that the Plan was amended to allow for the specific payments made in those instances. PA 633-35; Plan, § 5.2. USX in its capacity as employer may amend its benefit plan and its actions will not be judged by fiduciary standards. *Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988). In this case the Plan was never amended, however, and USX acting in its fiduciary capacity was obligated to pay "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104 (a)(1)(D). Payment of the pensions was not in accordance with the Plan provision 5.1(c).

Plaintiffs also rely on another section of the Plan, which provides:

> Continuous service shall be calculated from the Employee's last hiring date . . . to the date of retirement; provided, however, that in determining the length of continuous service for pension purposes . . .
>
> (2) any period or periods not creditable as continuous service for any pension calculation purposes under an agreement with a collective bargaining representative,
>
> . . . shall not be creditable as continuous service . . .

the Plan, § 5.1(b). Section 5.1(b) refers to time which will be *credited* as continuous service, not to the events which will cause a break in continuous service. Therefore, section 5.1 and the collectively-bargained 1980 Pension Agreement do not affect the company's ability to grant a leave of absence under the Plan provision 5.1(c) to prevent a break in service.[75] However, section 5.1(b) does provide that the 1980 Agreement affects the periods which can be credited as continuous service, and USX has not carried its burden of showing that it complied with this Plan provision in paying pensions to the Union officials. Specifically, to show it complied with this term of the Plan, USX must show the years the Union officials were working for the Union were either: (1) not credited as continuous service with USX for the purpose of granting 70/80 pensions to the officials; or (2) credited as continuous service with USX pursuant to a provision of the 1980 Pension Agreement.[76]

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[75] The collectively-bargained Pension Agreement between United States Steel Corporation and United Steelworkers of America effective July 31, 1980, provides in pertinent part:

> Continuous service shall be broken by:
> . . . absence which continues more than two years . . .

Agreement, 5.1(b)(4), PA 265-66.

[76] Plaintiffs also point to section 5.1(d) of the Plan, which provides:

> A break in continuous service shall be removed if the participant is rehired . . . provided that . . . (ii) as to any participant in a collective bargaining unit covered by a pension agreement, a break in continuous service shall be removed only if provided for in such agreement and, if so, in accordance with the provisions thereof.

The Plan, § 5.1(d). USX has pointed to no provision in the collective bargaining agreement which would allow it to remove the Union official's break in continuous service, but it does not appear that the Union officials were "participants" in that agreement, and it is certainly plain that they were never "rehired" by USX. Therefore, the applicability of section 5.1(d) to these circumstances is unclear.

Finally, as a fiduciary, USX was obligated to discharge its duties with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims. . ." 29 U.S.C. § 1104. Plaintiffs have presented evidence showing that USX, in its capacity as employer, granted the six Union officials pensions without checking to determine that the Union officials were qualified under the new leave of absence policy. PA 74, 542. USX has not denied this charge, but argues that it was acting in its "employer" capacity when it granted the leaves of absence and that once the leaves were granted by USX "the employer," USX "the fiduciary" had no choice but to grant the pensions. However, in its fiduciary capacity, USX had an obligation to act with prudence and diligence "solely in the interests of the participants and beneficiaries." 29 U.S.C. § 1104(a). USX has not shown it acted diligently in mechanically granting pensions out of Fund assets, considering USX in either its employer or fiduciary role had knowledge that USX "the employer" granted the leaves of absence under irregular circumstances and that the officials might not have been legitimately entitled to leaves of absence or pensions drawn from the Fund assets.

USX is not entitled to summary judgment as to plaintiffs' claim that it breached fiduciary duties since it has not shown that it acted with "care, skill, prudence, and diligence," and that it acted "solely in the interests of the participants and beneficiaries" when it granted pensions to Union officials who had received leaves of absence under USX's revised leave policy. 29 U.S.C. § 1104(a)(1)(A), (a)(1)(B). Further, USX has not established that it acted "in accordance with the documents and instruments governing the plan" when it paid pension benefits to Union officials who received retroactive leaves of absence from USX. 29 U.S.C. § 1104(a)(1)(D). USX

and the Fund's summary judgment motion as to Count IV of the complaint will be denied.

B. The Union.

Plaintiffs claim the Union violated ERISA by "failing to disclose" that USX and the Fund were paying pensions to Union officials out of the Fund, and by "failing to take appropriate action." Plaintiffs claim the Union thereby "ratified" USX and the Fund's acts and omissions and "knowingly participated" in USX and the Fund's breach of trust. Complaint, para. 112.

The Eleventh Circuit recently concluded a non-fiduciary cannot be held liable for participating in a fiduciary's breach under ERISA. *Useden v. Acker,* 1991 WL 245243 (11th Cir. Dec. 11, 1991). Plaintiffs point out that a non-fiduciary "party in interest" [77] may be sued for appropriate equitable relief under ERISA section 502(a)(3). 29 U.S.C. § 1132(a)(3). *Neito v. Ecker,* 845 F.2d 868, 873 (9th Cir. 1988).[78] The Union is a "party

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[77] The term 'party in interest' means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodia), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

. . .

The Act prohibits certain transactions between ERISA plans and their parties in interest. 29 U.S.C. § 1106(a)(1), *cf.* 29 U.S.C. § 1108(b).

[78] That section provides, in pertinent part:

A civil action may be brought . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-

in interest," but the plaintiffs have not asserted a claim for equitable relief against the Union with respect to the Fund or the Plan. Plaintiffs' Complaint, pp. 54-55. They have requested only that USX and the Fund be enjoined from further violations of 18 U.S.C. § 186 and that USX restore to the Fund the benefits it paid to Union officials. *Id.* Plaintiffs are not entitled to monetary relief under § 502(a)(3). *Useden,* 1991 WL 245243). Therefore, the Union's motion for summary judgment will be granted as to plaintiffs' ERISA claims.

VIII. The Section 302 Claim.

Plaintiffs amended their complaint to add a claim under section 302 of the Labor Management Relations Act of 1947, 19 U.S.C. § 186, seeking a prospective injunction against future violations of that statute. The Union claims it is entitled to judgment on this claim because, *inter alia,* it is not civilly or criminally liable for Rich and Phillips' actions. As noted above, there are unresolved questions of fact underlying this issue, and the Union is not, therefore, entitled to summary judgment on that claim. Furthermore, the parties have not fully addressed the claims under section 186, since the court previously indicated it will not address non-class claims until the class claims have been resolved.[79] Memorandum Opinion and Order, December 17, 1990. The class claims against the Union have now been fully resolved, and the Union is free to renew its motion should it conclude it continues to have a basis for the motion. However, given the cursory treatment of the section 186 claims in the present motion, the Union's motion will be denied.

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> chapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

29 U.S.C. § 1132(a)(3).

[79] Since the class has been certified with respect to damage claims only, it has no section 186 remedy.

IX. Conclusion.

The defendants' motion for summary judgment will be GRANTED as to plaintiffs' RICO claims, plaintiffs' hybrid section 301 claim, and plaintiffs' unfair labor practices claim. (Counts I, II, and III of the Complaint). The Unions' motion will be GRANTED as to plaintiffs' ERISA claims, and the Company and the Fund's motion will be DENIED as to plaintiffs' ERISA claims. (Count IV of the Complaint). The Union's motion is DENIED as to plaintiffs' claims for prospective injunctive relief under 29 U.S.C. § 186, without prejudice to its right to renew the motion. (Count V of the Complaint).

Done, this 16th of December, 1991.

/s/ Edwin L. Nelson
EDWIN L. NELSON
United States District Judge

[Filed Dec. 16, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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CV-88-N-2069-S

LESLIE RAY COX,

*Plaintiffs,*

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC; USX CORPORATION, a/k/a U.S. STEEL CORPORATION; and THE UNITED STATES STEEL & CARNEGIE PENSION FUND,

*Defendants.*

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ORDER ON SUMMARY JUDGMENT

In accord with the memorandum of opinion entered contemporaneously herewith, defendants' motions for summary judgment filed July 17, 1990 are hereby GRANTED in part and DENIED in part.

The motions are GRANTED as to plaintiffs' claims under 18 U.S.C. § 1961 *et seq.*, 29 U.S.C. § 185(a), and 29 U.S.C. § 158(d), set out in Counts I, II, and III of plaintiffs' amended complaint. Counts I, II, and III of plaintiffs' complaint are hereby DISMISSED.

The motion of USX Corporation and The United States Steel & Carnegie Pension Fund is DENIED as to plaintiffs' claim under 29 U.S.C. § 1132 *et seq.*, set out in Count IV of plaintiffs' complaint. The United Steelworkers of America's motion is GRANTED as to plaintiffs' claim in Count IV of the complaint, and Count IV of plaintiffs' complaint is hereby DISMISSED as to the Union.

The motions are DENIED as to plaintiffs' claim under 29 U.S.C. § 186, set out in Count V of the amended complaint.

Done, this 16th of December, 1991.

/s/ Edwin L. Nelson
EDWIN L. NELSON
United States District Judge

APPENDIX C

[Filed Feb. 18, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-88-N-2069-S

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LESLIE RAY COX, *et al.*,
*Plaintiffs,*

vs.

USX CORPORATION, *et al.*,
*Defendants.*

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MEMORANDUM OF OPINION

This cause is presently before the court on motion for reconsideration, filed by the plaintiffs' on December 31, 1991. The plaintiffs also seek to supplement the record regarding the defendants' motions for summary judgment and to amend their complaint. The plaintiffs alternatively seek an order directing entry of final judgment pursuant to Fed.R.Civ.P. 54(b) as to those claims that were dismissed on December 16, 1991.

I. Supplementation of the Record. The plaintiffs want to amend their appendix and evidence submitted in opposition to defendants' motions for summary judgment to add: (1) James Carney's handwritten and typed notes of a September 3, 1987, meeting between Andrew Toth, John Foley, John Eckman, J. Bruce Johnston, James Short, and James Carney; (2) J. Bruce Johnston's July 1989 deposition testimony about Carney's September 1987

notes; (3) James Short's July 1989 deposition testimony about the notes; (4) James T. Carney's October 1991 deposition testimony about the notes and the events of December 24, 1983; and (5) a local agreement entered into between USX and the Union at USX's National plant produced by USX in November 1990. Of this additional evidence, all but the October 1991 Carney deposition [1] was in plaintiffs' possession long before plaintiffs were required to respond to defendants' motions for summary judgment on May 15, 1991. Plaintiffs were allowed four months to organize their evidence and compose their brief in response to the defendants' briefs. In view of the significant amount of time and effort expended by the parties and the court in consideration of the motions, the court will not, at this late date, allow the plaintiffs an opportunity to supplement the record and reopen the motions.[2]

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[1] The Carney deposition excerpts contain testimony about the circumstances of the September 1987 meeting at which Carney took notes and testimony about the events of December 24, 1983, which, according to plaintiffs, "is consistent with the testimony of William Miller." Plaintiffs' Brief of December 31, 1991, at 5.

[2] The court routinely places page limits on briefs filed in support of and in opposition to significant motions. Recognizing the gravity of the motions, as it might affect the plaintiffs, the court acceded to their request that there be no limit on the length of their brief in opposition to the defendants' motions for summary judgment. It was a mistake which the court will not repeat. The plaintiffs, on May 15, 1991, filed a brief of 113 pages length which, to understate the case, was unhelpful. The brief demonstrated so little focus on issues and organization of thought that, rather than aiding the court in its efforts to resolve significant legal and factual issues, it actually impeded that process. Counsel had a professional obligation to present the court with clear, concise and focused analyses so that the issues might have been properly addressed. They failed in that obligation, leaving the court to founder in a sea of meaningless words and an ocean of exhibits.

Beginning in mid-September, 1991 and continuing on an almost daily basis until mid-December, 1991, the court examined thousands of pages of exhibits and considered the plaintiffs' arguments, as

II. Amendment of the Complaint. After a responsive pleading has been filed, amendments of the complaint are permitted only with leave of court. Fed.R.Civ.P. 15(a). Leave to amend shall be freely given when justice so requires. *Id.* However, denial of a plaintiff's motion to amend the complaint and supplement the record at a time when the court has already granted summary judgment but had not entered final judgment is not an abuse of discretion. *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401 (11th Cir. 1989). In this case, plaintiffs argued in their brief that they had been injured by the loss of the honest and faithful services of the Union negotiators, but the court found no such claim in plaintiffs' complaint or in the pretrial order. Nevertheless, the court considered the claim and found that the claimed deprivation of the "honest and faithful services of Union officials" is not the sort of injury to business or property RICO was intended to remedy. Therefore, the court finds nothing to be gained by allowing plaintiffs to amend their complaint at this late date.

III. Reconsideration of the Issues. Plaintiffs argue they presented sufficient evidence that defendants' RICO violations caused their injuries. The court has once again examined the evidence plaintiffs presented, and finds no support therein for plaintiffs' claim that USX's granting of leaves of absence to the Union negotiators was causally connected to the concessions in the Fairfield Works Agreement which caused plaintiffs' injury. As the court noted in its original opinion, a reasonable jury could not assume there was a causal connection between the pensions and the concessions in view of the significant evidence in the record of the "economic necessity" for concessions.

Plaintiffs claim that, in reaching its decision, the court drew factual inferences from circumstantial evidence and

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best they could be discerned. Now, having lost on motions for summary judgment, the plaintiffs have returned, asserting that they "inadvertently" failed to call to the court's attention evidence concerning the meeting of September 3, 1987.

implicitly made credibility findings because defendants' evidence of economic necessity was tainted by bias, *citing Wilmington Trust Co. v. Manufacturers Life Ins. Co.*, 624 F.2d 707 (5th Cir. 1980).

The court agrees that whether USX would have reopened the Fairfield Works absent the concessionary 1983 Agreement is a disputed issue of fact, and it has never made any contrary finding. Nevertheless, plaintiffs never disagreed with the defendants' evidence that the Works were closed and had been closed for many months preceeding the negotiations and that USX had threatened the Union and rank and file members that the plant would be permanently closed absent concessions in the agreement. The significance of defendants' evidence does not hinge on whether USX was candid with the Union about the need for concessions, but whether the Union negotiators actually had good cause, in 1983, to believe that concessions were economically necessary. Although there is a dispute about whether concessions were actually necessary to reach an agreement, there is no dispute that USX claimed concessions were necessary during the 1983 negotiations. Thus, the defendants presented evidence of one possible reason for the concessions in the Fairfield Works Agreement. The plaintiffs argued there was another possible reason, the concessions were traded for Company pensions. But plaintiffs never presented any evidence of such a trade. Plaintiffs argued that a jury could infer or assume there was a causal connection between the concessions and the payment of pensions to Union officials. Such an inference would be reasonable only if there were no other explanation for the concessions. The undisputed evidence in the record is that there was one other possible reason for the concessions, USX's position during the negotiations that the concessions were economically necessary to reopen the Works. Thus, any inference that the concessions *must* have resulted from a bribe would be unreasonable. Plaintiffs are entitled only to reasonable inferences. *Brown v. City of Clewiston,*

848 F.2d 1534, 1540 n.12 (11th Cir. 1988); *Fidelity and Deposit Co. of Maryland v. Southern Utilities, Inc.*, 726 F.2d 692, 694 (11th Cir. 1984) (a verdict based on circumstantial evidence is not infirm simply because the evidence supports an equally probable inference to the contrary, as long as the inference on which the verdict is based is a reasonable one). On reconsideration, this court remains convinced that it correctly concluded that plaintiffs failed to present evidence of any causal connection between the alleged RICO violation and the concessions in the Fairfield Works Agreement.

IV. Discovery.

Plaintiffs claim they have been hampered in presenting their case by the court's orders limiting the scope of discovery to the Fairfield plant. The court is satisfied that its decision to limit discovery with regard to other collective bargaining agreements is sound. Agreements at other plants present uncontrollable variables resulting from differences in size, location, equipment, productivity, and other unknowable factors, which makes the collective bargaining process unique to each plant. A comparison of the bargaining results between plants is, therefore, the proverbial comparison of apples and oranges. The innumerable possible variables between plants makes the result of collective bargaining at plants other than Fairfield irrelevant.

Plaintiffs also argue they have not yet completed discovery. In ruling on the summary judgment motions the court attempted to give full consideration to plaintiffs' inability to obtain certain discovery due to the pending appeals from this court's discovery orders, and the plaintiffs do not here claim the court failed to consider any outstanding discovery which was addressed in their Rule 56(f) motion. *See Plaintiffs' Verified Motion for Extension of the Submission Date, filed May 15, 1991.* Plaintiffs now claim they do not yet have copies of arbitration

and grievance proceedings conducted by Rich and Phillips, but they do not explain why they have been unable to obtain that evidence or why they did not inform the court of their lack of discovery in that area prior to the court's ruling on the summary judgment motions. Shortly before the court entered its ruling on the summary judgment motions it extended the discovery deadline to September 1, 1992, but the prior deadline of September 1, 1991 had already expired before the court extended the deadline. *See* orders of May 1, 1991, and December 11, 1991. Plaintiffs have not explained why they did not obtain this discovery before responding to the summary judgment motions, or before the court ruled on the motions.

V. Plaintiffs' claim that the Union breached its duty of fair representation.

On reconsideration, the court has concluded it improperly shifted the burden of showing there was no dispute of material fact with regard to plaintiffs' claim that the Union breached its duty of fair representation. The Union argued only that plaintiffs' unfair representation claim was unfounded because there was no evidence that the Union negotiators exchanged concessions for pensions. Union Brief of January 16, 1991, at 51. For the reasons set out in the court's original opinion, the court concluded the plaintiffs did not have evidence that the concessions were exchanged for pensions and granted the Union's motion for summary judgment. However, the Union did not challenge plaintiffs' separate claim that the Union breached its duty of fair representation by failing to disclose to rank and file Union members that Union officials had requested Company leaves of absence during the Fairfield Works Agreement negotiations and that Union officials had received Company pensions. Since the Union had not met its burden of proving there was no issue of material fact, that claim was improperly dismissed and will be reinstated.

A separate order in conformity with this opinion will be entered.

Done, this 18th of February, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
United States District Judge

[Filed Feb. 18, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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CV-88-N-2069-S

LESLIE RAY COX, *et al.*,
*Plaintiffs,*

vs.

USX CORPORATION, *et al.*,
*Defendants.*

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ORDER

In accord with the memorandum of opinion entered contemporaneously herewith, plaintiffs' motion for reconsideration is hereby GRANTED and, upon reconsideration, plaintiffs' claim set out in Count II, paragraph 94 of their complaint is hereby REINSTATED. In all other respects, the court's order of December 16, 1991 shall remain unchanged.

Done, this 18th of February, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
United States District Judge

**APPENDIX D**

[Filed Feb. 18, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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CV-88-N-2069-S

LESLIE RAY COX, *et al.*,
*Plaintiffs,*

vs.

USX CORPORATION, *et al.*,
*Defendants.*

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FINAL JUDGMENT AS TO FEWER THAN ALL CLAIMS

The court finds there is no just reason for delay of entry of final judgment, and hereby DIRECTS entry of final judgment pursuant to Fed.R.Civ.P. 54(b) as to the following claims:

1. plaintiffs' claims under 18 U.S.C. § 1961 *et seq.* and 29 U.S.C. § 158(d), set out in Counts I and III of plaintiffs' amended complaint;

2. plaintiffs' claims under 29 U.S.C. § 185(a) against defendant USX Corporation, as set out in Count II of plaintiffs' amended complaint; and

3. plaintiffs' claims under 29 U.S.C. § 1132 against defendant United Steelworkers of America, as set out in Count IV of plaintiffs' amended complaint.

Done, this 18th of February, 1992.

/s/ Edwin L. Nelson
EDWIN L. NELSON
United States District Judge

## APPENDIX E

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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Nos. 91-7215, 92-6218

LESLIE RAY COX; R.M. COX; LARRY DRIVER; BARRY NICHOLS; JOHN BULLARD; ROBERT W. KENNEDY, JR.; LORENZO G. EAST; CLARENCE M. POPE, JR.; C.R. ALTES; JACK E. MERRYMON; TERRY P. WEST; R.S. ARNOLD; M.W. MILSTEAD; J.W. WADE; MANNING A.C. SNIDER; TERRY H. MELVIN; THOMAS E. HILL; GARY D. SWANN; RONALD E. FRAZIER; ANTHONY J. CRAPET; ROBERT M. GREEN; HEATH L. MCMEANS, III; BILLY CARTER; JOE A. KNIGHT; PHILLIP L. DRUMMOND; BRACK WELLS; GEORGE BOGLIN; DENNIS E. JONES; DENNIS R. FULTON; DON L. FLURRY; W.T. MAYBERRY; WILLIE YOUNG; ROBERT POOLE; WARDELL CLARK; WILLIE J. NATION; OSCAR LEE PERRY; HARRY S. TURNER and JAMES R. MILLER, suing individually and on behalf of a class of similarly situated individuals, ETC.,

*Plaintiffs-Appellees, Cross-Appellants,*

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE and UNITED STATES STEEL & CARNEGIE PENSION FUND,

*Defendants,*

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC and USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,

*Defendants-Appellants, Cross-Appellees.*

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LESLIE RAY COX; R.M. COX; LARRY DRIVER; BARRY NICHOLS; JOHN BULLARD; ROBERT W. KENNEDY, JR.; LORENZO G. EAST; CLARENCE M. POPE, JR.; C.R. ALTES; JACK E. MERRYMON; TERRY P. WEST; R.S. ARNOLD; M.W. MILSTEAD; J.W. WADE; MANNING A.C. SNIDER; TERRY H. MELVIN; THOMAS E. HILL; GARY D. SWANN; RONALD E. FRAZIER; ANTHONY J. CRAPET; ROBERT M. GREEN; HEATH L. MCMEANS, III; BILLY CARTER; JOE A. KNIGHT; PHILLIP L. DRUMMOND; BRACK WELLS; GEORGE BOGLIN; DENNIS E. JONES; DENNIS R. FULTON; DON L. FLURRY; W.T. MAYBERRY; WILLIE YOUNG; ROBERT POOLE; WARDELL CLARK; WILLIE J. NATION; OSCAR LEE PERRY; HARRY S. TURNER and JAMES R. MILLER, suing individually and on behalf of a class of similarly situated individuals, ETC.,

*Plaintiffs-Appellants,*

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE and UNITED STATES STEEL & CARNEGIE PENSION FUND; UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC and USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Alabama

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Aug. 19, 1994

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Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, District Judge.

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* Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

ON PETITIONS FOR REHEARING AND SUGGESIONS FOR REHEARING EN BANC

PER CURIAM:

Upon consideration of the petitions for rehearing, the opinion issued on April 5, 1994, and published at 17 F.3d 1386, is modified as follows:

(1) The second paragraph of section II.B.1.b, which is found at 17 F.3d at 1398, and begins "Under § 1962(c) it is unlawful . . . .", is deleted. In its place is substituted the following paragraph:

> Under § 1962(c) it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." USX argues that a jury could not find a violation of that subsection because USX cannot be both the "person" and the "enterprise" contemplated by § 1962(c). However, the plaintiffs have alleged only that USX conducted the affairs of the Fairfield Works, the Union, District 36 of the Union, and the Fund through a pattern of racketeering activity—not that USX conducted its own affairs through a pattern of such activity. We conclude that the pension fund is an enterprise separate from USX. The Supreme Court recently reemphasized that "'[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact.'" *National Org. for Women, Inc. v. Scheidler* [—— U.S. ——, ——], 114 S.Ct. 798, 805 [127 L.Ed.2d 99] (1994) (quoting *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527 [69 L.Ed.2d 246] (1981)). In *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367 (6th Cir.1993), an insurance company was

held liable under this section of the statute for participating in the affairs of an independent insurance agency composed of agents of the insurance company engaged in the business of selling policies issued by the insurance company. The Sixth Circuit held that the agency was a separate enterprise from the insurance company. The agency had a separate existence, its own board of directors, and conducted its own business. We conclude that the pension fund in the instant case is even more separate and distinct from USX than were the two entities in *Davis*. The pension fund has a separate corporate existence; it is a nonprofit membership corporation. Its existence is not dependent upon USX, and could, for example, continue long after USX went out of business. The pension fund has its own governance, which is controlled and regulated by comprehensive statutory and regulatory provisions. Thus, the governance of the pension fund is separate and distinct from that of the corporation itself. Persons are involved in a pension fund who would have no involvement in the corporation with which it is associated at all; for example, a pension fund has investment advisors and actuaries as fiduciaries. Although both USX and its employees have a role in the pension fund, the role of each in the pension fund is distinct and different from the respective role each has in the corporation itself. For example, the corporation is administrator of the pension fund, but of course its role as administrator is very different from its role in its corporate existence; its role as administrator is constrained by all of the numerous ERISA statutes and regulations. Similarly, the employees of the corporation have a different role with respect to the pension fund; there, they are participants with rights regulated by the comprehensive statutory and regulatory scheme.

(2) The final sentence in the third paragraph of section II.B.3.a, which is found at 17 F.3d at 1404, and

begins "As discussed in subpart B.1.b., above, . . . .", is deleted.

The petitions for rehearing are otherwise denied, and no member of the panel nor other judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestions for rehearing en banc are denied.

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(3)

# In The Supreme Court of the United States

October Term, 1994

UNITED STEELWORKERS OF AMERICA,

*Petitioner,*

v.

LESLIE RAY COX, et al.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF RESPONDENT USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit erred in holding that the RICO "pattern of racketeering" requirement may be satisfied through the allegation that a single bribe transaction with a single objective encompassed a series of separate criminal events—the solicitation of the bribe, the agreement to the bribe, and the payment of the bribe in monthly installments (pension payments) rather than in a lump sum—a holding contrary to the rule in five other circuits that a single transaction with a single objective cannot be made into a "pattern" by dissecting the transaction into a series of discrete criminal acts.

2. Whether the Eleventh Circuit erred in holding, contrary to the rule in the eleven other circuits, that a RICO action under 18 U.S.C. § 1962(c)—which makes it unlawful for "any person" who is "employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity"—may be brought against the "enterprise" itself.

## DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Respondent USX Corporation is a publicly owned corporation with three classes of common stock, USX-Marathon Group, USX-U.S. Steel Group, and USX-Delhi Group.

Non-wholly owned subsidiaries of Respondent USX Corporation include CLAM Petroleum Company, Double Eagle Steel Coating Company, Laredo-Nueces Pipeline Company, National-Oilwell, PRO-TEC Coating Company, USS/Kobe Steel Company, USS-POSCO Industries, Worthington Specialty Processing, Transtar, Inc., LOCAP INC., LOOP INC., Kenai LNG Corporation, Ozark Gas Transmission System, and RMI Titanium Company.

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## BRIEF OF RESPONDENT USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent USX Corporation ("USX") respectfully submits that a Writ of Certiorari should be granted in connection with both questions presented in the petition of the United Steelworkers of America ("Union").

## REASONS FOR GRANTING THE WRIT

### I. The Eleventh Circuit's Decision That Allegations Of A Single Bribe Can Satisfy RICO's "Pattern" Requirement Conflicts With Decisions Of The First, Second, Third, Sixth And Seventh Circuits.

USX supports the Union's petition on the RICO pattern issue. The decision below graphically illustrates the need for further Supreme Court guidance with respect to the "pattern" required for liability under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§1961 *et seq.* In a singularly overbroad interpretation, the Eleventh Circuit held that the requisite pattern element under RICO can be satisfied by allegations of a single bribe which is offered, accepted, and paid out in monthly installments. This holding squarely conflicts with the settled law in five other circuits.

The RICO provision at issue here, § 1962(c), creates liability for participation in a "pattern of racketeering activity." 18 U.S.C. § 1962(c). Under the statutory definition, a "pattern" requires at least two acts of racketeering activity. 18 U.S.C. § 1961(5). Beyond this "minimum necessary condition," "continuity plus relationship" also are required. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 237-39 (1989). More specifically, racketeering predicates must be related, and they must amount to or pose a threat of long term or continued criminal activity. *Id.* at 239.

Plaintiffs below alleged a single bribe or act of extortion. They claimed that in the course of negotiating a labor agreement to reopen the idled Fairfield Works, USX agreed to grant leave of absence credits to certain Union officials who formerly worked for USX in exchange for contract concessions. Thereafter, USX allegedly paid out the bribe in the form of monthly pension benefits. To transform this plain and simple alleged bribe into a pattern of racketeering activity, the Eleventh Circuit split the transaction into its necessary component parts. The court found that the pattern requirement was satisfied by the mere alleged facts that (1) a bribe was solicited, (2) the bribe was agreed to, and (3) the bribe was paid in the form of pension benefits, in monthly installments, over a three and one half year period. Union App. at 13a-14a.

The Eleventh Circuit held that acts which are part of the same scheme or transaction can qualify as distinct predicate acts "so long as 'each act constitutes a separate violation of the state or federal statute governing the act in question.' " Union App. 13a (citing *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985)). Because each separate pension payment was alleged to be a violation of 29 U.S.C. § 186, the Eleventh Circuit reasoned, each payment qualified as a distinct predicate act. The Eleventh Circuit dispensed with the "continuity" requirement mandated by the teachings of this Court with a summary conclusion that the alleged bribe could be viewed "as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity." Union App. 13a.

The Eleventh Circuit's interpretation of "pattern of racketeering" directly conflicts with the weight of authority in the other circuits. The courts of appeals for the First, Second, Third,

Sixth and Seventh Circuits all have held that the pattern requirement cannot be satisfied by dissecting a single transaction with a single objective into a series of component parts:

| | |
|---|---|
| **First Circuit:** | *Roeder v. Alpha Indus.*, 814 F.2d 22, 30-31 (1st Cir. 1987). |
| **Second Circuit:** | *Clapp v. Greene*, 743 F. Supp. 273, 277-78 (S.D.N.Y. 1990), *aff'd*, 930 F.2d 912 (2d Cir.), *cert. denied*, 112 S.Ct. 197 (1991). |
| **Third Circuit:** | *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1417-19 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991). |
| **Sixth Circuit:** | *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134-35 (6th Cir. 1994). |
| **Seventh Circuit:** | *420 East Ohio Ltd. Partnership v. Cocose*, 980 F.2d 1122, 1124-25 (7th Cir. 1992); *United States Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1267-69 (7th Cir. 1990). |

In *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992), Justice Breyer, in an opinion he authored as Chief Judge of the First Circuit, summarized the prevailing view as follows:

> [H]owever courts express the point, they have consistently held that a single episode does not constitute a "pattern,"

> even if that single episode involves behavior that amounts to several crimes (for example, several unlawful mailings).

To hold otherwise, Justice Breyer explained, "would mean that many individual bank robberies, frauds, drug sales, embezzlements, and other crimes as well would automatically fall within the scope of the RICO statute, a result contrary to RICO's basic purpose." *Id.* at 722, *citing H.J. Inc.*, 492 U.S. at 239.

The anomalous result of the court of appeals below is contrary to RICO's basic purpose and creates confusion which only this Court can allay. This Court should further illuminate the contours of the pattern requirement, and free litigants in the Eleventh Circuit from the uniquely expansive interpretation adopted below.

## II. The Eleventh Circuit's Rule That A Corporate Entity May Simultaneously Be Both An "Enterprise" And A "Person Employed By Or Associated With" That Enterprise Under 18 U.S.C. § 1962(c) Is In Conflict With The Law In Every Other Circuit.

The Eleventh Circuit stands alone in holding that a § 1962(c) RICO action may be brought against an "enterprise." The eleven other circuits have all concluded that § 1962(c) means what it says—that it is unlawful for "any person employed by or associated with any enterprise" to conduct the affairs of that enterprise through a pattern of racketeering activity.

The plain language of § 1962(c) clearly contemplates that a "person" is distinct from the "enterprise" itself:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such

> enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). The "person" targeted by the prohibitions in § 1962(c) is an entity separate from the "enterprise." It is the conduct of the "person" that is rendered unlawful under the Act, not the conduct of the enterprise.

The Eleventh Circuit has rejected this literal construction of § 1962(c), holding that a corporate entity may *simultaneously* be both a § 1962(c) "person" and a § 1962(c) "enterprise." This view not only flies in the face of the clear language of the statute; it also is directly at odds with the law in every other circuit. All other courts of appeals have held that § 1962(c) applies *only* to persons employed by or associated with an enterprise, and not to the enterprise itself:

| | |
|---|---|
| **D.C. Circuit:** | *Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 139-41 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948, 950-51 (D.C. Cir. 1990) (en banc), *cert. denied*, 501 U.S. 1222 (1991). |
| **First Circuit:** | *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44-45 (1st Cir. 1991). |
| **Second Circuit:** | *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 314-15 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986). |
| **Third Circuit:** | *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411-13 (3d Cir. 1993). |
| **Fourth Circuit:** | *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) (en banc), *aff'd*, 948 F.2d 1280 (4th Cir. 1991). |

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| **Fifth Circuit:** | *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). |
| **Sixth Circuit:** | *Puckett v. Tennessee Eastman Co.*, 889 F.2d 1481, 1488-89 (6th Cir. 1989). |
| **Seventh Circuit:** | *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 966-68 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988). |
| **Eighth Circuit:** | *Bennett v. Berg*, 685 F.2d 1053, 1061-62 (8th Cir. 1982), *aff'd in pertinent part*, 710 F.2d 1361, 1364 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008 (1983). |
| **Ninth Circuit:** | *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533-34 (9th Cir. 1992). |
| **Tenth Circuit:** | *Board of County Comm'rs* of *San Juan County v. Liberty Group*, 965 F.2d 879, 885 & n.4 (10th Cir.), *cert. denied*, 113 S.Ct. 329 (1992). |

The decision of the court of appeals below rests on an interpretation of § 1962(c) that is squarely the opposite of the law in all these circuits. Absent action by this Court, litigants in the Eleventh Circuit will continue to face civil and criminal liability which Congress simply did not create. This Court should bring the law of the Eleventh Circuit into conformity with the law of the other circuits and, more basically, with the law enacted by Congress.

## CONCLUSION

The Union's petition presents two fundamental questions of RICO interpretation. On the pattern issue, the Eleventh Circuit's decision is directly contrary to clearly-settled law in the First, Second, Third, Sixth and Seventh Circuits. With respect to the enterprise issue, the Eleventh Circuit's decision is premised upon a square conflict with the law in all eleven other circuits. USX respectfully submits that these conflicts raise important issues with respect to the interpretation and application of RICO which require resolution by this Court.

Therefore, the Writ of Certiorari sought by the Union should be granted.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STEELWORKERS OF AMERICA,
*Petitioner (defendant below),*

v.

LESLIE RAY COX, *et al.*,
*Respondents (plaintiffs below).*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Circuit was correct in affirming the district court's denial of a summary judgment sought by defendant Union on the grounds that a jury could reasonably find the Union liable under 18 U.S.C. § 1962(c) for conducting its own affairs through a pattern of racketeering activity when the Union knew that two of its most important officials had demanded and had received illegal periodic payments from an employer during collective bargaining negotiations, had ratified the illegal acts, had rendered material assistance in covering up the bribes by filing a false affidavit concealing the facts, had maintained the Union officials in office and had maintained that the Union and USX officials involved in the bribery had done nothing illegal?

2. Whether the Eleventh Circuit was correct in affirming the district court's denial of a summary judgment sought by defendant Union on the grounds that a jury could reasonably find that the Union's actions in connection with concealment of bribes paid over a seven-year period by a pension fund administered by USX to six powerful Union officials (who were in a position to help USX by betraying rank-and-file Union members in collective bargaining negotiations, grievance proceedings, arbitration proceedings, and the conduct of their duties as Union officials) constituted a "pattern of racketeering activity" under RICO?

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# No. 94-724

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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UNITED STEELWORKERS OF AMERICA,
*Petitioner (defendant below),*

v.

LESLIE RAY COX, *et al.*,
*Respondents (plaintiffs below).*

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

In addition to the opinions identified by the Union in its petition, the opinion for the Eleventh Circuit affirming criminal convictions in a related proceeding, *United States v. Phillips,* is reported at 19 F.3d 1565 (11th Cir. 1994). Petitions for certiorari in the criminal case are pending before this Court.

### STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 186: Appendix A, (p. 1a).

18 U.S.C. § 1961(1): Appendix A, (p. 2a).

18 U.S.C. § 1962(a): Appendix A, (p. 4a).

18 U.S.C. § 1962(b): Appendix A, (p. 5a).

18 U.S.C. § 1962(c): Appendix A, (p. 5a).

18 U.S.C. § 1962(d): Appendix A, (p. 5a).

## STATEMENT OF THE CASE

### A. Statement Of Facts.

In March 1983, defendant USX Corporation ("USX" or ("Company") and defendant United Steelworkers of America ("Union") negotiated a new four-year national collective bargaining agreement known as the 1983 Basic Labor Agreement ("BLA") that contained many concessions by the Union.[1] The 1983 BLA covered all rank-and-file steelworkers at all USX facilities in the United States and Canada.

In September 1983, USX and the Union commenced negotiations with respect to a local agreement (which became known as the Fairfield Works Agreement) which modified the BLA and affected some 5,000 employees in Jefferson County, Alabama. Thermon Phillips and E. B. Rich, officers and full-time employees of the Union, represented the steelworkers in these negotiations. Phillips was a director of the Union, elected by the Union's District 36 (a distinct subdivision of the Union including Alabama, Mississippi, Louisiana, Florida, Puerto Rico and the Virgin Islands). Phillips was also Secretary of the Union's Negotiating Committee for the 1983 and 1987 Basic Labor Agreements, and Union Chairman of the Basic Steel Industry Audit and Review Board. E. B. Rich was sub-director of District 36 and was on the Union's Negotiating Committee for the 1987 BLA.

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[1] The Basic Labor Agreement was renegotiated in 1987 and 1991.

At the commencement of the Fairfield Works local negotiations and in violation of 29 U.S.C. § 186, E. B. Rich gave William Miller, the Company's principal negotiator, a list of nine Union officials and told Miller that there would be no local agreement unless the Company agreed to pay the specified Union officials pensions from the United States Steel & Carnegie Pension Fund ("Fund"). The nine Union officials were not qualified to receive Company pensions. The Union negotiators' pension demand remained "on the table" throughout the Fairfield negotiations. On December 24, 1983, when USX incorporated the Union's concessions in a typewritten proposed agreement, Mr. Rich and Mr. Phillips refused to sign the agreement unless USX gave them a favorable reply regarding the officials' pension demand. USX gave a favorable reply as to six of the nine specified Union officials, and the two Union negotiators signed the local Fairfield Works Agreement.[2] In 1984, the Fairfield Six were awarded the pensions which the Fairfield negotiators had demanded.[3] Union App. 4a-5a.

Meanwhile, in November 1983, one month after USX and the Union commenced concessionary negotiations concerning the Company's Gary Works, located in the Union's District 31, USX granted Jack Parton, then Director of the Union's District 31, a leave of absence which provided Parton with pension credit to which Parton was not entitled. Union App. 63a.

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[2] The 1983 Fairfield Works Agreement was used by USX to obtain concessionary local agreements at other facilities. The Agreement abolished 500 rank-and-file job positions, permitted the Company to "contract out" work to non-Union firms, abolished certain craft jobs, cancelled pending grievance and arbitration proceedings, and in other ways took away rights that plaintiffs had under the 1983 BLA. The Company has saved, by its own estimate, a net of more than $23.5 million each year since 1983 in labor costs. That money would have been paid to plaintiffs had they been recalled and compensated pursuant to the 1983 BLA and subsequent BLAs.

[3] The value of the six pensions USX granted was approximately $500,000.

Prior to 1983, when USX granted a leave of absence in excess of the two-year maximum provided for by the BLA to Jack Parton and when USX committed that it would grant retroactive pension credit and USX pensions to the Fairfield Six, USX had in effect a leave of absence policy which was memorialized in the BLAs and which permitted leaves of absence of USX employees to work full-time for the Union for no more than two years. The Union had been trying for years to get the Company to change its leave of absence policy so as to allow all former USX employees who were now employed as officers in the Union to continue to accrue USX pension service credit. The President of the Union, Lynn Williams, testified in his deposition in this action that any Union official who could "get wedges out there" and "push the leave of absence question past the Company" has done a "good thing." Union App. 37a.

On October 22, 1984, the Corporate Policy Committee ("CPC") of USX (which included the highest officials of USX) secretly adopted a resolution which changed the Company's *internal* leave of absence policy to allow the Company's Executive Vice President of Labor Relations, J. Bruce Johnston, *discretion* to grant *retroactive* leaves of absence and USX pensions to certain full-time Union officials.[4]

The resolution presented to the CPC stated that the new October 22, 1984 policy was intended to benefit USX:

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[4] In 1984, while the Fairfield Works Agreement was being implemented and the details of the pensions for the Fairfield Six were being worked out by USX, Rich mentioned the pension promise several times during meetings with USX officials; Jack Golden, Director of the Union's District 37 , delivered to William Miller, USX's principal negotiator, a written "agreement" drafted by Rich; Bruce Johnston wrote Miller, expressing concern as to whether the Company was in jeopardy of losing its "momentum" with Rich and Phillips (App. pp. 13a, 15a); and Miller responded that "the thing [Rich and Phillips] have their eye on, and *the thing that will affect this relationship*, is how we respond to the pensions request which Jack Golden brought to us last week . . ." App. p. 16a [Emphasis added.]

> It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, *it is the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.* App. p. 6a. [Emphasis added.]

USX contacted Rich, Phillips and the four other District 36 officials and secretly arranged to have the Fund begin mailing monthly pension checks, and provide health and life insurance benefits. Monthly payments were made directly to the Fairfield Six until May 1988, when USX caused the Fund, which USX administered, to begin making the monthly payments into six separate escrow accounts maintained by Mellon Bank for the benefit of the six Union officials and cancelled the health and life insurance benefits. App. p. 21a.

Five months later, on March 5, 1985, Bruce Johnston wrote a letter to Lynn Williams, stating that the Company had amended its leave of absence policy and had granted early retirements to six unnamed Union officials. App. p. 11a. Johnston did not enclose a copy of USX's amended leave of absence policy. Williams testified that he did not request any further information from USX, and testified that he did nothing but refer the March 5, 1985 letter to the Union's general counsel, Bernie Kleiman. Williams testified in the criminal trial that the Union takes the position that it will not get involved when its officials seek unlimited pension credit from the Company during collective bargaining negotiations.

In January 1986, Bruce Thrasher, the Director of the Union's District 35, suspected that Rich and Phillips were receiving Company pensions. That month, Thrasher spoke with Rich about his suspicion and reminded Rich that Rich had told Thrasher in July 1983 that there would be no local agreement

without pensions being granted to Union officials, including Thrasher. Rich told Thrasher that Rich was *not* receiving a USX pension and that the pension matter was still being negotiated with USX.

Still suspicious, Thrasher telephoned Jerome Cooper, the Union's Alabama counsel, and then telephoned Bernard Kleiman, the Union's general counsel in Pittsburgh. Thrasher testified that he told Kleiman what Rich had said to him in July 1983. Thrasher testified that Kleiman expressed shock at the allegations, denied any knowledge of the pensions and promised to investigate. Over the next six months, Thrasher kept in touch with Kleiman but Kleiman told Thrasher that, after a preliminary investigation he had nothing to report, that "USX had refused to talk about the matter," that Lynn Williams had categorically denied any knowledge of what Thrasher had alleged, and that Kleiman could not provide an answer to Thrasher's concerns.

On October 16, 1986, Thrasher filed suit against the Company and the Union in the Northern District of Alabama alleging that Rich and Phillips had been awarded pensions during collective bargaining negotiations in Fairfield in 1983 and that Thrasher was entitled to a pension as well. Union App. 23a, 41a. The *Thrasher* Complaint also alleged that Rich had told Thrasher in July 1983 that there would be no agreement at Fairfield if the pension demands were not granted. The day after a copy of the *Thrasher* Complaint was served on Thermon Phillips, Phillips met with Carl Frankel, the Union's deputy general counsel, and told Frankel that he *was* receiving a Company pension. Despite this disclosure, in its Answer, filed in the *Thrasher* suit on December 1, 1986, the Union *denied* that Rich and Phillips were receiving USX pensions as a result of the Fairfield negotiations. Union App. 23a, 41a. On April 22, 1987, just before the *Thrasher* defendants were due to respond to Thrasher's discovery requests, the suit was settled pursuant to an agreement under which USX agreed to pay Thrasher $88,574 (the present value of

a USX pension), Thrasher agreed to dismiss with prejudice his claims against USX *and* against the Union, and Thrasher agreed to keep the settlement confidential.

In 1988, another Union official, William Sommerville, filed suit against USX and the Union for damages for refusal to grant him a pension, alleging that Rich and Phillips had received pensions as part of the 1983 Fairfield negotiations. Union App. 23a, 41a. The Union filed a motion for a protective order to bar Sommerville from taking the depositions of Rich and Phillips. The Union also filed a motion to dismiss, asserting that the pension Sommerville was seeking would violate 29 U.S.C. § 186. In support of its motion to dismiss, the Union filed an affidavit of its general counsel, Bernie Kleiman. In that affidavit, Kleiman stated that, as of January 30, 1986, Rich and Phillips had *not retired from USX*. The Court of Appeals noted that "Kleiman swore in an affidavit that Rich, Phillips and two others of the Fairfield Six had not retired from USX as of January 30, 1986, although USX records clearly indicate that, for pensions purposes, they had retired." Union App. 23a.

When word leaked out among other Union officials that Rich and Phillips might be receiving Company pensions, Andrew Toth and many other officials wrote the Company requesting USX pension credit, and pensions, for the years during which they had been employed full-time by the Union. Union App. 6a. USX tried to "stall" its response to the Union officials until USX could rescind its unlimited leave of absence policy.

On April 28, 1987, the same day the *Thrasher* suit was dismissed, J. Bruce Johnston wrote Lynn Williams advising that USX's amended leave of absence policy violates the law and had been rescinded, *but that the six unnamed union officials who had been awarded USX pensions pursuant to the amended policy would continue to receive them.* App. p. 17a. Williams responded by letter stating that USX was responsible for its own "unilateral actions." App. p. 19a. At about the same time, USX

denied the requests for USX pensions submitted by Andrew Toth and other Union officials.[5] there is no evidence that the Union *ever* asked the Company for information regarding the Company's 1984 amended leave of absence policy or told *any* Union officials that USX's leave of absence policy had been changed.

Despite 29 U.S.C. § 186 and the Union's own Code of Ethics, both of which clearly prohibit what Rich and Phillips had done, there is no evidence that the Union ever made *any* inquiry other than Kleiman's oblique claims to Thrasher that he had investigated but had found nothing to report. The Union has produced no evidence that it conducted any investigation, or that it had reprimanded or disciplined Rich or Phillips prior to their conviction. In fact, Rich and Phillips were kept in office until October 1990 and then were permitted to retire early on Union pensions.

**B. Proceedings Below.**

Plaintiffs filed this action in 1988. The district court certified this action as a class action on behalf of employees of USX in Jefferson County, Alabama represented by the Union "in collective bargaining negotiations, grievance proceedings, or arbitration proceedings," from 1983 to the present. Plaintiffs assert that defendants conspired to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 et seq.) by a pattern of racketeering activity including mail fraud, violations of 29 U.S.C. § 186 and obstruction of justice (by the Union, for its filing the false affidavit of its general counsel in violation of 18 U.S.C. § 1503). Plaintiffs assert that the Fairfield Works Agreement should be declared void, that plaintiffs' rights under the 1983 BLA and subsequent national Basic Labor Agreements have been breached by the Company, that the Union failed to

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[5] These officials filed suit against USX and the Union. See *Toth v. USX Corp.*, 693 F.Supp. 693 (N.D. Ill. 1988), *aff'd*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989).

give plaintiffs fair representation because the Union representatives demanded and accepted bribes from the employer, USX, and were paid those bribes on a continuing basis while the Union officials "represented" plaintiffs from September 1983 to October 1990 in collective bargaining and in grievance proceedings and arbitration proceedings, and that plaintiffs are entitled to relief under § 301(a) of the Labor Management Relations Act (LMRA) (29 U.S.C. § 185(a)).

After plaintiffs began discovery, a federal grand jury returned indictments against USX, J. Bruce Johnston (USX's Executive Vice President), and E. B. Rich and Thermon Phillips. A jury convicted USX of conspiracy to influence Union officials, violations of 29 U.S.C. § 186, mail fraud and violations of ERISA. Rich and Phillips were convicted of conspiracy and violations of 29 U.S.C. § 186. The convictions of USX, Rich and Phillips were affirmed by the Court of Appeals. *U.S. v. Phillips*, 19 F.3d 1565 (11th Cir. 1994).[6]

Prior to completion of discovery in this civil action, the Company and the Union filed motions for summary judgment. The district court determined that the Company and Union could be liable under RICO for engaging in a pattern of 29 U.S.C. § 186 violations. The district court held that the Union could be liable under 18 U.S.C. § 1962(d) for conspiring with USX, Rich and Phillips to violate § 1962(a), § 1962(b) and § 1962(c), and under 18 U.S.C. § 1962(c) for conducting the affairs of Fairfield Works, the Fund, District 36 and its own affairs (all RICO enterprises) through that pattern of illegal acts. Union App. 15a, 93a-108a. The district court, however, entered summary judgment against plaintiffs on the ground that a jury could not reasonably find that the bribes had influenced the Union negotiators or that the plaintiff rank-and-file employees had been damaged by the defendants' actions.

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[6] J. Bruce Johnston has not yet been tried. Petitions for writ of certiorari by the criminal defendants are now pending before this Court.

The Court of Appeals reversed, holding that a reasonable jury could conclude that the 1983 Fairfield Works Agreement was tainted by bribery, that the Agreement was voidable, and that the jury could properly find that plaintiff employees had sustained damages. The Court of Appeals rejected defendants' alternative grounds for affirmance and found, without considering whether mail fraud and obstruction of justice should be included in the "pattern" equation, (1) that a reasonable jury could find a "pattern" of violations of 29 U.S.C. § 186 (Union App. 12a-14a) and (2) that the Union could be liable for violations of 18 U.S.C. §§ 1962(c) and 1962(d) (Union App. 26a-43a).

## REASONS FOR DENYING THE WRIT

This Court should deny certiorari regarding the so-called "non-identity" rule for the following reasons: (1) the rationale for the "non-identity" rule has no application under the facts of this case, and (2) it is unnecessary to reach the issue because the courts below have determined that a jury could reasonably find the Union liable for violation several RICO prohibitions.

This Court should deny certiorari regarding the "pattern of racketeering activities" issue for the following reasons: (1) the establishment of a RICO "pattern" is a factual issue to be resolved by a jury, and a jury could reasonably find from the evidence that defendants had engaged in a pattern of racketeering activity, (2) this was not, as insisted upon by the Union, a "single garden variety bribe" but was, like the situation in *H. J. Inc.*, a "scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity," and, (3) this Court has already addressed the "pattern" issue in *H. J. Inc.*, and the holding of the Court of Appeals below is consistent with *H. J., Inc.*, so that there is no need for this Court to revisit the RICO "pattern" question.

### I.

### THE UNION'S PETITION REGARDING THE SO-CALLED "NON-IDENTITY" ISSUE UNDER 18 U.S.C. § 1962(C) SHOULD BE DENIED.

The Union's petition regarding the so-called "non-identity" issue under 18 U.S.C. 1962(c) should be denied for the following reasons:

### A. There Is No True Conflict Among The Courts Of Appeal. A Union That Is Not An "Innocent Victim" Or A Legitimate Enterprise Is Not Entitled To The Benefit Of The "Non-Identity" Rule.

Although the Union claims that it is an "innocent victim" and a "legitimate" enterprise, the facts of the case show otherwise. The Court of Appeals and the district court below recognized that a jury could reasonably find the Union liable under RICO for the acts of its president, Lynn Williams, its general counsel, Bernard Kleiman and two of its highest officials, E. B. Rich and Thermon Phillips. The Union approved of and concealed the bribes demanded by Rich and Phillips during the negotiations that led to the concessionary Fairfield Works Agreement. The Union's policy for years has been that the Union's employees are entitled to receive unearned pensions from employers with whom they deal. Lynn Williams has testified that any Union official who has bargained for such a pension has done a "good thing."

The Court of Appeals held that the Union could be liable under RICO based on *respondeat superior* principles, ratification, aiding and abetting, and conspiracy. Union App. 33a-43a. Moreover, there is evidence that (1) Jack Parton, Director of the Union's District 31 demanded and received a similar bribe during concessionary local collective bargaining negotiations in the fall of 1983 with USX in Gary, Indiana (See Union App. 63a), (2) Jack Golden, Director of the Union's District 37 was involved in the mechanics of Rich's and Phillips payoff and (3) Bruce Thrasher, Director of the Union's District 35 obtained the present value of a pension from USX by filing a lawsuit against USX *and the Union* alleging that he was entitled to the same pension that Rich and Phillips had demanded and obtained during the Fairfield negotiations. All of the foregoing facts support the conclusion that the Union is not an "innocent victim"

or an "innocent conduit" whose affairs were conducted through a pattern of racketeering activity.[7]

The "non-identity" rule which has been applied by the other circuit courts of appeal had its genesis in a concern by those courts that a *innocent* and *legitimate* "enterprise" could become liable under § 1962(c) of RICO simply because the "enterprise" had been used by others as a *passive instrumentality* of racketeering activity. For example, the Court of Appeals in *D& S Auto Parts, Inc. v. Schwartz,* 838 F.2d 964 (7th Cir. 1988), *cert. denied,* 486 U.S. 1061 (1988), held that the defendant enterprise, which had, upon discovering an employee's embezzlement, immediately fired the employee and had reported the embezzlement to the proper authorities, should not be held liable under § 1962(c). In this case, however, the facts are vastly different.

Many of the cases cited by the Union recognize that an "enterprise" should not escape liability under RICO when the "enterprise" itself is involved in illegal activity. For instance, the Third Circuit in *Brittingham v. Mobil Corp.,* 943 F.2d 297, 302 (3d Cir. 1991) stated: "It is theoretically possible for a corporation to take a separate 'active' role in RICO violations also committed by its employees. The corporation would not be the passive victim, but the active perpetrator."[8]

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[7] There is no evidence in the record to support a contention that the Union was an "innocent victim" or a "passive instrumentality" of the racketeering at issue.

[8] Other circuits have reached a similar conclusion. See *Busby v. Crown Supply, Inc.,* 896 F.2d 833, 839 n.5 (4th Cir. 1990) (*respondeat superior* applies when enterprise is an 'aggressor'); *Yellow Bus Lines, Inc. v. Driver's Local 639,* 883 F.2d 132, 140 (D.C. Cir. 1989), *cert. denied,* 501 U.S. 1222 (1991) referring to *Hartley,* the court said that "an exception to the non-identity rule has at times been made for the institution that functions as both 'perpetrator' and 'victim' "); *Brady v. Dairy Fresh Products Co.,* 974 F.2d 1149, 1155 (9th Cir. 1992) ("*respondeat superior* and agency liability furthers both the compensatory and deterrent goals of the RICO statute" by

*(Footnote 8 continued on next page)*

This Court is presented with a union whose officials pursue their own interest instead of those of the rank-and-file workers which the union is supposed to represent. The Union itself has abandoned its statutory duty by encouraging its officials to demand and accept bribes and then has kept its bribe-taking officials in office until their felony convictions *forced* their departure. The notion put forth by the Union that RICO was enacted to protect a union which betrays rank-and-file members is morally offensive. This Union is anything but "innocent." This Union has abandoned the interests of its rank-and-file members and has preferred the interests of its own officials.[9] The real victims in this case are the employees of the Fairfield Works, who were entitled to receive faithful, honest, non-corrupt representation. See *Toth v. USX Corp.*, 693 F. Supp. 693, 699 (N.D. Ill. 1988), *aff'd*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989).

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*(Footnote 8 continued)*

encouraging "employers to monitor more closely the activity of their employees and agents to ensure that these agents are not involved in racketeering activities."); *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 n.5 (7th Cir. 1988), *cert. denied*, 486 U.S. 1061 (1988) (there may be situations in which illegal conduct takes place "at such a high level that it may be deemed corporate policy to promote or engage in illegal conduct."); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986) (the non-identity rule "focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrumentality of the racketeering activity:); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993) (stating that purpose of the rule is to prevent the punishment of innocent victims, the court noted that in *Brittingham, supra*, plaintiff "failed to produce evidence indicating that the defendant corporation, in contrast to individuals or entities acting on their behalf, took a distinct role in the alleged racketeering activity.")

[9] The Union's position in this litigation is but one example. Moreover, the Union leadership to this day embraces Rich and Phillips by raising money for them and by including the ex-officials in many Union affairs.

The Eleventh Circuit decision below, following *U.S. v. Hartley,* 678 F.2d 961 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983), was correct in interpreting § 1962(c) of RICO so as to permit liability to be imposed on a union when the union, as a RICO person, conducts its own affairs through a pattern of racketeering activity. The opinion below is fully in accord with those decisions in other circuits recognizing that a culpable "enterprise" may be liable for damages under § 1962(c).

The Union appears to argue that any union is *ipso facto* a "legitimate" and "innocent" enterprise that could never be held liable under RICO. The Eleventh Circuit recognized below, however, that the Sixth Circuit has held that:

> Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

Union App. 32a (quoting *Davis v. Mutual Life Ins. Co.,* 6 F.3d 367, 379 (6th Cir. 1993), *cert. denied,* 114 S.Ct. 1298 (1994).)

This Court has recognized, in another context, in *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991), that imposition of liability under *respondeat superior* principles furthers important societal goals:

> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented."

*Id.* at 14 [Citations omitted.]

### B. In Any Event, It Is Unnecessary For This Court To Reach The "Non-Identity" Issue In This Case Because The Union May Be Held Liable For Violating Several Provisions Of RICO.

The question of whether the Union can be held liable under 18 U.S.C. § 1962(c) for conducting its own affairs through a pattern of racketeering activity does not need to be decided by this Court because, as the Union concedes in its petition (at p. 13 n.6), the Court of Appeals held that the Union could also be liable under 18 U.S.C. § 1962(c) for conducting the affairs of the Fund and/or the affairs of the Fairfield Works through a pattern of racketeering activity.[10]

The opinion of the Court of Appeals states:

> Even if we adopted the non-identity rule, however, the Union still would not be exempt from liability. Although the plaintiffs have alleged that the Union is a RICO enterprise for purposes of § 1962(c), they also allege that the Fairfield Works and the Fund are enterprises as well. The non-identity rule would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund. (Union App. 33a).

Plaintiffs asserted below that the Union is liable under 18 U.S.C. § 1962(c) for conducting the affairs of its District 36 through a pattern of racketeering activity.[11] (Union App. 93a).

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[10] There is no evidence in the record to support the Union's claim that Fairfield Works cannot be a RICO enterprise. Fairfield Works is an enterprise that has its own budget and management and for many years was separately incorporated as the Tennessee Coal, Iron and Railroad Company. There is also no merit to the Union's claim that the corruption of the Fund, the source of the bribe money, could not have injured plaintiffs.

[11] District 36 is a discrete political and geographical division of the Union which covers Alabama, Mississippi, Louisiana, Florida, Puerto Rico and the Virgin Islands and which has its own director and officers.

The Court of Appeals below affirmed the district court's conclusion that the Union could also be liable under 18 U.S.C. § 1962(d) (Union App. 43a) for conspiring with USX, Rich and Phillips to violate 18 U.S.C. § 1962(a), § 1962(b) and § 1962(c). Union App. 93a.

The issue raised by the Union would become important only if a jury found the Union liable *only* under 18 U.S.C. § 1962(c) and then *only* for conducting its *own affairs* through a pattern of racketeering activity. Contrary to the Union's assertion in footnote nine of the petition, and as discussed in Section A above, the cases relied on by the Union do not foreclose imposition of RICO liability on a Union that approves of and acquiesces in the bribe-taking of its officials and takes affirmative measures to conceal demands for bribes and receipt of bribes when they occur. Given the facts of this case as well as the posture of plaintiffs' RICO claims, it seems unlikely that the jury would so limit its verdict.

Plaintiffs respectfully submit that this Court should not grant the Union's petition for certiorari at this time because the Union is not an innocent, legitimate "enterprise" and because this Court need not reach and decide the issue presented, which is highly unlikely to have any effect on the Union's ultimate liability under RICO.

## II.

## THE ELEVENTH CIRCUIT WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT ON THE "PATTERN" ISSUE RAISED BY THE UNION'S PETITION, BECAUSE A JURY COULD REASONABLY FIND THAT PAYMENTS BY USX TO SIX UNION OFFICIALS WHICH CONTINUED FOR A PERIOD LONGER THAN FOUR YEARS AND WHICH WERE CONNECTED BY A COMMON SCHEME, PLAN OR MOTIVE WERE SUFFICIENT FOR A JURY TO FIND "CONTINUITY" AND "RELATEDNESS" AND A "PATTERN OF RICO ACTS

The Union argues in its Petition that plaintiffs have not established a pattern of racketeering activities. The Union argues that the monthly bribes paid to each of the six Union officials were simply a part of a single act of bribery with multiple installment payments. The same arguments were made below by USX and the Union, and were rejected by the district court and the Court of Appeals.

In addressing this argument the Court of Appeals correctly applied this Court's teaching in *Sedima, S.P.R.L. v. Imrex Co.*, 472 U.S. 479 (1985) and *H. J., Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229 (1989) to find that "a single episode of bribery could be viewed by a jury as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity" Union App. P. 13a. The Court of Appeals pointed out that "[e]ach monthly payment of pension benefits to the Fairfield Six could be interpreted as a 'thing of value' for purposes of 29 U.S.C. § 186, and therefore could be interpreted as a separate predicate act for purposes of RICO." *Id.* The Court of Appeals also held that the "Parton matter is plainly relevant to plaintiffs' efforts to establish a pattern of RICO violations." Union App. 63a.

The payments of bribes to the Union officials were made pursuant to an amendment by USX's Corporate Policy Committee of the Company's leave of absence policy. The amended leave of absence policy was used by USX to pay monthly pensions to those Unions officials whom Johnston (USX's Executive Vice President - Labor Relations) approved in his discretion. Direct monthly payments to the Fairfield Six were made for a period of more than four years and have thereafter continued to date to be made into escrow, for the benefit of the Fairfield Six. In addition, USX granted each of the Fairfield Six health and life insurance benefits, which USX cancelled in June 1988. USX would still be making payments directly to the Union officials, had not the fact of the payments, notwithstanding efforts of both USX and the Union to cover up the payments, come to light. In separate letters to each of the Union officials dated May 26, 1988, J.D. Short, USX's Vice President - Administration, advised each of the Fairfield Six that the pensions, due to their questionable legality, would thereafter be paid into "an interest-bearing escrow account." (App. p. 21a.) In a letter from USX Executive Vice President, J. Bruce Johnston, to Union President Lynn Williams, dated April 28, 1987, Johnston advised that although the amendment to the leave of absence policy had been rescinded, USX was "not rescinding the leaves of absence which previously had been granted pursuant to such policy." (App. p. 18a.)

Thus, the racketeering predicates alleged by the plaintiffs meet the "continuity plus relationship" pattern of *H. J., Inc.*. since the racketeering predicates are "related *and* . . . they amount to and pose a threat of continued criminal activity." *H.J., Inc.*, 492 U.S. at 236. This Court recognized in *H.J., Inc.*, quoting its holding in *Sedima*, that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 492 U.S. at 240.

In addition to the obvious fact that the Fairfield Six were on the Company's "payroll" for a long period of time (and would have remained so to this day if the defendants had not been caught), the fact that illegal pension credit was also given to Jack Parton, a Director of another Union District, and the fact that the Union knew of the bribes and attempted to conceal the scheme in many ways, including the obstruction of justice, the threat of continuity is established by the fact that payment of illegal bribes was a part of USX's and the Union's regular way of doing business.

As this Court made clear in *H.J., Inc.* "... threat of continuity is sufficiently established where the predicate can be attributed to a defendant operating as a part of a long-term association that exists for criminal purposes . . . The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise'." *Id.* at 242.

Without question, the criminal conduct of USX and the Union at Fairfield Works and Gary Works embraces criminal acts (violations of 29 U.S.C. § 186, the mail fraud statute and 18 U.S.C. § 1503), and the criminal acts have the same or similar "purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." Here the overall purpose was not only to bribe Union officials into agreeing to concessions in the December 24, 1983 Fairfield Works Agreement, but *also* to obtain the services of the six Fairfield Union officials in implementing the Fairfield Works Agreement, collective bargaining, grievance proceedings and arbitration proceedings. The new leave of absence policy was crafted by a committee made up of the Chairman of the Board and Chief Executive Officer of USX, the President of USX and other senior Company officials. The illegal bribes continued to be made to the Union officials for over

four years and have continued thereafter to be paid into six interest-bearing escrow accounts.

The Union argues that the payments to six Union officials was merely a single bribe. In its Petition (at p. 9), the Union blithely characterizes the scheme as "a garden variety bribe transaction." Plaintiffs fail to appreciate the Union's apparent efforts to minimize the significance of the bribes paid to the Union's six officials. What is involved in this case is a *series* of bribes paid with the approval of USX's senior management and with the approval and assistance of the Union's President, Lynn Williams and general counsel, Bernie Kleiman. Approximately 5,000 persons in the plaintiff class were adversely affected and were deprived of faithful Union representation from *1983* to *1990* (when Rich and Phillips were finally removed from office) and even thereafter, because the Fairfield Works Agreement continues to this day to be enforced.

In *H.J., Inc.* this Court was faced with a somewhat similar fact situation, in which a public utility had been accused of making illegal cash payments to members of a state regulatory commission, and of giving them other items of value over an extended period. The district court dismissed the petitioner's complaint on the ground that the complaint alleged only a "single fraudulent effort or scheme." The Court of Appeals affirmed, and this Court granted certiorari, holding, at the outset that "[m]ost Courts of Appeals have rejected the Eighth Circuit's interpretation of RICO's pattern concept to require an allegation and proof of multiple schemes . . ." 492 U.S. at 235. This Court held, in *H.J., Inc.*, that in adopting RICO, Congress envisioned "a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and amounted to, or threatened the likelihood of continued criminal activity." *Id.* at 237.

The Union would have this Court grant certiorari because the Union asserts a conflict in decisions of the circuits has arisen

*after* this Court's holding in *H.J., Inc.* The cases relied upon by the Union are all distinguishable on their facts. Moreover, the Union in its petition (p. 16, n.9) and USX in its brief in support of the Union's petition (at p. 3), cite *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (1st Cir. 1987) which was decided *before* this Court's decision in *H. J., Inc.* In *Fleet Credit Corporation v. Sion,* 893 F.2d 441 (1st Cir. 1990), the First Circuit stated that *Roeder* was no longer good law, and stated that "[i]n the future, however, courts should directly follow the Supreme Court's formulation in *H.J., Inc.*; the pre-*H.J., Inc.* approach is no longer a reliable guide." *Id.* at 445.

Since this Court has fully addressed the "pattern" issue in *H.J., Inc.*, it is unnecessary for this Court to address the issue again. The Court of Appeals below applied *H.J., Inc.* correctly, holding that defendant's motions for summary judgment *as to this issue* was properly denied by the district court below, because a jury could reasonably find that the Union and the Company engaged in a "pattern" of racketeering acts. There is no reason why this Court should grant certiorari and revisit the RICO "pattern" requirements. The Union's Petition for Certiorari should, therefore, be denied.

## CONCLUSION

Plaintiffs respectfully submit that this Court should deny the Union's Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

J. Vernon Patrick, Jr.*
Alexander S. Lacy
William M. Acker, III
Elizabeth N. Pitman
Patrick & Lacy, P.C.
1201 Financial Center
Birmingham, Alabama 35203
(205) 323-5665

*Counsel of Record

Samuel Maples
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Birmingham, Alabama 35203

Michael H. Bite, Jr.
Bite, Bite & Bite
2001 Park Place Tower
Suite 1245
Birmingham, Alabama 35203

# APPENDIX

## APPENDIX A

### 29 U.S.C. § 186

**Restrictions of payments to employee representatives**

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

**18 U.S.C. § 1961.**

**Definitions**

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative [relating] to fraud and related activity in connection with access devices), section 1094 (relating to the transmission

of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), section 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

*[See main volume for text of (2) to (9)]*

(10) "Attorney General) includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465; Nov. 6, 1978, P. L. 95-598, Title III, § 314(g), 92 Stat. 2677; Oct. 12, 1984, P. L. 98-473. Title II, Ch IX, § 901(g), Ch X, Part N, § 1020, 98 Stat. 2136, 2143; Oct. 25, 1984, P. L. 98-547, Title II, § 205(1), (2), 98 Stat. 2770; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle H, § 1365(b), 100 Stat. 3207-35; Nov. 10, 1986, P. L. 99-646, § 50(a), 100 Stat. 3605; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, §§ 7013, 7020(c), 7032, 7054, Subtitle N, Ch 1, § 7514, 102 Stat. 4395, 4396, 4398, 4402, 4489; Aug. 9, 1989, P. L. 101-73, Title IX, Subtitle F, § 968, 103 Stat. 506.)

**18 U.S.C. § 1962.**

**Prohibited activities**

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the

meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debts.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat. 4398.)

## APPENDIX B

## PLAINTIFFS' EXHIBIT #75

FOR CONSIDERATION OF THE CORPORATE POLICY COMMITTEE — October 22, 1984

| | |
|---|---|
| Company: | United States Steel Corporation |
| Subject: | Revision of PER 223-51, Leaves of Absence |
| Scope: | Former Employees of United States Steel Corporation who are current employees of the United Steelworkers of America International Union as defined in the Proposal |
| Basis for Proposal: | Under the Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representatives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agreements. Thus, it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW. |

Therefore, it is proposed that the Leave of Absence Policy be revised to permit granting leaves of absence beyond two years with the concurrence of the Corporate Policy Committee.

Proposal: Effective February 29, 1984

(a) Amend paragraph B.2.d of PER 223-51 by replacing the second sentence of such paragraph with the following sentence (underscoring denotes the change):

"Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the Company, *except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time.*"

(b) Grant leaves of absence to former employees who meet the conditions specified below:

A leave of absence shall be granted for the period between the date on which the employee left active employment with United States Steel Corporation and the earlier of (i) the date of retirement from United States Steel Corporation, or (ii) the date employment with the United Steelworkers of America International Union terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the

purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided with respect to such service shall be determined solely on the minimum formula of the rules; and further, that such leave of absence shall be granted only to employees of United States Steel Corporation's current steel producing operations (e.g., Fairless, Mon-Valley, Lorain, Gary, Geneva, Texas and Fairfield) who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union, (b) from the time of cessation of active employment until February 29, 1984 shall have continued in the active employment of the International Union and (c) shall continuously have held positions servicing bargaining units at the U. S. Steel division in which he had been employed.

Recommendation: That the foregoing proposals be adopted by the Corporate Policy Committee.

Submitted by /s/ J. Bruce Johnston
J. Bruce Johnston
Executive Vice President
Employee Relations

**PLAINTIFFS' EXHIBIT #73**

UNITED STATES STEEL CORPORATION
CORPORATE POLICY COMMITTEE
Meeting of October 22, 1984
Pittsburgh, Pennsylvania

A meeting of the Corporate Policy Committee of United States Steel Corporation was held at 600 Grant Street, Pittsburgh, Pennsylvania, on Monday, October 22, 1984, at 9:15 A.M.

There were present:

D. M. Roderick
T. C. Graham
R. M. Hays
H. D. Hoopman
J. B. Johnston
T. Marshall
W. E. Swales
W. B. Thomas

being a quorum.

The Chairman, D. M. Roderick, presided. R. M. Hays was Secretary.

Revision to PER 223-51

On motion, duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED: That revision of PER 223-51, Leaves of Absence, in the Administration Manual - Personnel, as set forth in statement submitted to this meeting, be, and the same hereby is, authorized as amended at the meeting.

CPC 10/22/84

Adjournment — On motion, duly made, seconded and unanimously carried, the meeting adjourned.

/s/ R. M. Hays
Secretary

**PLAINTIFFS' EXHIBIT #86**

United States Steel Corporation
600 Grant Street
Pittsburgh, Pennsylvania 16230

J. Bruce Johnston
Executive Vice President
Employee Relations

March 5, 1985

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

Dear Lynn:

From time to time we review and update our records concerning pension administration matters including those relating to Company recognition of bargaining unit employees who accept positions with the International Union. Accordingly, it is timely to restate U.S. Steel's policy for granting Leaves of Absences for such purposes.

As in the past, we will comply fully with the language of Section 13 of the Basic Labor Agreement which defines the availability of Leaves of Absence. In addition to the provisions set forth in Section 13, please be advised that, effective February 29, 1984, United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis. Pursuant to the above policy, we have approved requests for Leaves for six (6) International Union Representatives, qualifying those individuals for early retirements under the United States Steel Pension Plan.

We continue to recognize the value to both parties in granting requests for Leaves of Absence, on an even-handed basis, to a reasonable number of employees who accept or hold positions with the International Union for responsibilities which directly serve U.S. Steel facilities.

Yours very truly

/s/ J. Bruce Johnston

**PLAINTIFFS' EXHIBIT #19A**

**Mill, union view work schedules differently**

(*Birmingham Post-Herald, 7-12-84*)

Roughly one out of five workers at U.S. Steel's Fairfield Works are now working four-day weeks, Robert Armstrong, president of U.S. Steelworkers of America Local 1013, said.

The plant's maintenance workers, pipefitters, millwrights and electricians — shifted to the four-day work week this week, Armstrong said.

The workers have been told they will return to a five-day work week after four to six weeks, according to Armstrong.

The exact number of maintenance workers employed at the plant was not available.

Maintenance workers earn an average hourly wage of $11.80, Armstrong said.

That means biweekly paychecks will contain about $100 less than they previously did.

"This is a big blow to them financially," Armstrong said.

Many maintenance workers still are recuperating from large debts incurred while the plant was closed for 21 months before reopening in February.

"Nobody has had time to get caught up on bills," Armstrong said.

Sloan Hill, as official spokesman for U.S. Steel said there were no "significant changes" in work schedules.

The union president's account of changes at the plant was slightly different from that given by Hill.

Hill, public affairs manager, said the change in work schedules is strictly routine. He said workers normally are scheduled only when they are needed.

"In this crazy business we're in, you're on when the need is there," Hill said.

Most workers change schedules at least weekly, he said.

"Every other department shifts from day to day, or week to week."

The steel plant had to lay off nearly 100 maintenance workers in April, Hill said.

The workers received pink slips after only about two months of employment at the plant.

"A number of maintenance people came in to help get the plant started up again. But when the job was done, it was done," Hill said.

The change in work schedules simply shows that the need for maintenance work has lessened again, he said.

But Armstrong said the need for maintenance work has not changed since April.

He said the company decided to hire outside help rather than continue to employ union members full time.

"We would understand if work was not available for us, but the outside contractors are doing work that our people should be doing," Armstrong said.

Local 1013 filed a grievance about the practice several weeks ago. Following grievance procedures, the next step will be arbitration, Armstrong said.

Armstrong said he was told by the company that workers would have been laid off if the work week had not been shortened.

Meanwhile, it seems that almost 100 maintenance workers who were laid off in April have little hope of returning to their jobs soon, Armstrong said.

The workers were told they would be rehired as soon as possible, he said.

"The only thing the company told me at that time was they didn't feel like it would be a long-term thing.

[*Handwritten note next to article*]

WM

1. what is the real story?

2. are we in jeopardy of losing our momentum with E.B. and Thermon

JBJ

7/14/84

**PLAINTIFFS' EXHIBIT #19**

United States Steel Corporation

July 23, 1984

Mr. J. Bruce Johnston:

*Birmingham Post-Herald Article 7-12-84*

In response to your first question on the subject clipping, the real story is that Fairfield is experiencing the same downturn in flat roll operations as the Company's other plants. As a result, it has become necessary to reduce Central Shops maintenance forces. This was done by going to a four-day workweek rather than a layoff. Actually, the affected employees and most of the local union representatives were happy with this choice, since the last thing most Fairfield employees want at this stage is another layoff. A potential issue was about to arise as a result of Operating Management planning to contract our Shops' work while our employees were on a four-day week, but Steve Menzel headed that off with the operators.

With respect to our second question concerning Thermon Phillips and E.B. Rich, nothing in this incident has impacted our relationship with them. The thing they have their eye on, and the thing that will affect this relationship, is how we respond to the pension request which Jack Golden brought to us last week and which I forwarded to you last Friday.

/s/ WM
William Miller

gb
attachment

**PLAINTIFFS' EXHIBIT #96**

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

April 28, 1987

Dear Mr. Williams

As you may recall, on March 5, 1985, I wrote you to advise that the then United States Steel Corporation had amended its leave-of-absence policy in order to permit the award of retroactive leaves of absence to designated union officials who had left its employ prior to January 1, 1978 to accept positions with the International Union. Eligibility for such leaves of absence was limited to employees who had previously worked in USX's then existing steel producing operations and who had continuously serviced the USX division which they had left. Moreover such leaves of absence would permit employees to receive pension credit for certain types of pension only. This amendment had been adopted in response to complaints by International Union officials that USX had been much more restrictive in its grants of leaves of absence to long term Union officials than had the other employers in the steel industry.

Although at the time, we believed that granting of such leaves of absence was fully permissible under law, we have now concluded in view of recent Decisions by the Second Circuit Court of Appeals in *BASF Wyandotte Corporation v. Local 227 International Chemical Worker's Union and AFL-CIO, et. al.*, 791 F.2d 1046 (2d Cir. 1986) and most particularly, by the Third Circuit Court of Appeals in *Trailways Lines v. The Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC*, 785 F.2d 101 (3rd Cir. 1986, cert. den. 1986) that granting such leaves of absence (or accepting such leaves of absence)

violates the prohibitions of Section 302 of the Labor Management Relations Act.

Accordingly, we have rescinded such amendments to our leaves-of-absence policy to assure compliance with the law. Consistent with that change, we are denying several recent requests for such leaves of absence (apparently based on the earlier amendment) from employees of the International Union. We are not rescinding the leaves of absence which previously had been granted pursuant to such policy.

Yours very truly,

/s/ J. Bruce Johnston

J. Bruce Johnston

**PLAINTIFFS' EXHIBIT #97**

United Steelworkers of America
AFL-CIO-CLC
Five Gateway Center
Pittsburgh, PA 15222

Lynn R. Williams
International President

June 24, 1987

J. Bruce Johnston
Executive Vice President-Employee Relations
USX Corporation
600 Grant Street
Pittsburgh, Pennsylvania 15230

Dear Mr. Johnston:

This is in response to your letter of April 28, 1987 regarding the Company's new leave-of-absence policy.

To place the matter in context, I note that this is the second letter I have received from you announcing a policy change by the Company with respect to the circumstances under which it would or would not grant a leave-of-absence to employees who accept positions with the United Steelworkers of America. The earlier letter is dated March 5, 1985 and informed me of a policy effective February 9, 1984 by which the Company would determine whether to grant leave-of-absences applied for by International Union representatives for longer periods than those established in the Labor Agreement "in designated circumstances, at the discretion of the Company on a case-by-case basis." Your current letter states that you are now rescinding that policy and denying several recent requests for leaves-of-absence based on the former policy. In no case did the Company negotiate on the matter with the Union before amending or rescinding an existing policy relating to the leaves-of-absence subject.

Let me state the Union's position with respect to this matter clearly and concisely. As far as we are concerned, the Company acted unilaterally on both occasions and you bear the full responsibility for your actions. For the Union's part, we intend to pursue and vindicate whatever leave-of-absence rights flow from our collective bargaining and benefit agreements, including applicable practices.

Though little purpose is served by debating such matters at this juncture, I do want to record the Union's disagreement with your current explanation for the change in leave policy which became effective February 29, 1984 and, indeed, with the current description of the contents of that three-year old policy. It seems to me that what is being said by the Company in April of 1987 on these two subjects does not entirely square with what was said in March of 1985. The differences are evident when you compare the two letters.

Finally, my lawyers advise me that the pension accrual issue aside, the Third Circuit case you cited, *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO-CLC,* 785 F.2d 101 (3d Cir. 1986, *cert. den.*. 1986), does not stand for the proposition that the Company is legally precluded from granting leaves-of-absence to International employees thereby preserving their Company recall rights. You may wish to re-examine your position on that score.

Sincerely,

/s/ Lynn R. Williams
LYNN R. WILLIAMS
INTERNATIONAL PRESIDENT

**PLAINTIFFS' EXHIBIT #108**

United States Steel and
Carnegie Pension Fund

(A Pennsylvania Corporation)

600 Grant Street
Pitsburgh, Pennsylvania 15230

J.D. Short
Vice President — Administration

May 26, 1988

Mr. Thermon Phillips
1240 Southwind Drive
Helena, AL 35080

Dear Mr. Phillips:

I write you in connection with your receipt of a USX 70/80 retirement under Mutually Satisfactory Conditions. As you will recall, you are receiving that pension because you were granted a leave of absence, retroactive to the date of your termination with United States Steel Corporation (now USX). This retroactive leave of absence was the result of the adoption by USX of a policy of granting such leaves of absence under carefully defined circumstances. This policy authorized the removal of the break in your pension continuous service, which occurred in 1953. That removal resulted in your being granted pension continuous service credit, retroactively, for the intervening period.

Since that time, three Decisions by the United States Court of Appeal (for the Second, Third and Fifth Circuits, respectively) have raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union officials to receive credit for pension purposes for extended periods which they spend in the service of the Union. Recently,

two lawsuits have been filed by former and present Union officials -- one in Alabama by Messrs. Summerville and Elliott and the other in Illinois by Messrs. Sadlowski, Toth, Foley, et al., seeking to require USX Corporation to expand its granting of retroactive pension continuous service credit to cover the named plaintiffs for extended periods of time in which they were in the employ of the Union.

While it was the preference of USX and of the United States Steel and Carnegie Pension Fund, which is also a defendant in these actions, to await ruling from the courts concerning the appropriate action to be taken with respect to these requests for leaves of absence as well as past grants of leaves of absence, we now have been advised by outside counsel that continued payment of pension to you, in light of the current legal developments, could possibly subject both you and the defendants in these actions to criminal liability. In view of the above, we have determined that the only prudent course of action for us to take is to suspend your pension immediately, and to pay such pension into an interest bearing escrow account pending a final, definitive judicial resolution of the litigation in question and, if necessary, appropriate court rulings with respect to the leave of absence granted you (of course, while your pension is in suspension, you will not be covered by USX's retiree life and medical insurance).

I am sure that you will understand the reasons for our decision with respect to this matter.

Yours very truly,

/s/ J.D. Short
Vice President-Administration

United States Steel and
Carnegie Pension Fund

(A Pennsylvania Corporation)

600 Grant Street
Pitsburgh, Pennsylvania 15230

J.D. Short
Vice President — Administration

May 26, 1988

Mr. E.B. Rich
1425 Miami Drive
Birmingham, AL 35214

Dear Mr. Rich:

I write you in connection with your receipt of a USX 70/80 retirement under Mutually Satisfactory Conditions. As you will recall, you are receiving that pension because you were granted a leave of absence, retroactive to the date of your termination with United States Steel Corporation (now USX). This retroactive leave of absence was the result of the adoption by USX of a policy of granting such leaves of absence under carefully defined circumstances. This policy authorized the removal of the break in your pension continuous service, which occurred in 1953. That removal resulted in your being granted pension continuous service credit, retroactively, for the intervening period.

Since that time, three Decisions by the United States Court of Appeal (for the Second, Third and Fifth Circuits, respectively) have raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union officials to receive credit for pension purposes for extended periods which they spend in the service of the Union. Recently, two lawsuits have been filed by former and present Union

officials -- one in Alabama by Messrs. Summerville and Elliott and the other in Illinois by Messrs. Sadlowski, Toth, Foley, et al., seeking to require USX Corporation to expand its granting of retroactive pension continuous service credit to cover the named plaintiffs for extended periods of time in which they were in the employ of the Union.

While it was the preference of USX and of the United States Steel and Carnegie Pension Fund, which is also a defendant in these actions, to await ruling from the courts concerning the appropriate action to be taken with respect to these requests for leaves of absence as well as past grants of leaves of absence, we now have been advised by outside counsel that continued payment of pension to you, in light of the current legal developments, could possibly subject both you and the defendants in these actions to criminal liability. In view of the above, we have determined that the only prudent course of action for us to take is to suspend your pension immediately, and to pay such pension into an interest bearing escrow account pending a final, definitive judicial resolution of the litigation in question and, if necessary, appropriate court rulings with respect to the leave of absence granted you (of course, while your pension is in suspension, you will not be covered by USX's retiree life and medical insurance).

I am sure that you will understand the reasons for our decision with respect to this matter.

Yours very truly,

/s/ J.D. Short
Vice President-Administration

Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

No. 94-724

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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UNITED STEELWORKERS OF AMERICA,
*Petitioner,*

v.

LESLIE RAY COX, *et al.*,
*Respondents.*

---

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY BRIEF FOR PETITIONER

---

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*Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149 (9th Cir. 1992) ..... 4
*Brittingham v. Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991) ..... 4, 5
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*Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28 (1st Cir. 1986) ..... 3, 5
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-724

UNITED STEELWORKERS OF AMERICA,
*Petitioner,*

v.

LESLIE RAY COX, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER

### ARGUMENT

Respondents' Brief in Opposition ("Opp.") attempts (a) to wish away the circuit conflict that the court below freely acknowledged on the central RICO issue raised by our first question presented, and (b) to rewrite the decision below on the second question presented in order to bring that decision into line with the conflicting decisions of five other circuits.[1]

### I. THE NON-IDENTITY ISSUE

A. In expressly refusing to join the eleven circuits that have adopted the "non-identity rule" for construing 18 U.S.C. § 1962(c), the court below stated that it

[1] In so doing that brief also grossly distorts the facts of this case. But at this jurisdictional stage those factual distortions are beside the point since none alters the essential character of the legal issues presented to this Court. We therefore leave the correction of those distortions to the merits papers.

was "squarely reject[ing]" the "law of other circuits." Pet. App. 32a-33a. *See* Pet. 9-14. Yet respondents contend that there is no circuit conflict, because the non-identity rule adopted by the other circuits applies only to "innocent victim" or "legitimate" enterprises, Opp. 12-15. Respondents' "innocent enterprise/guilty enterprise" dichotomy has no predicate in the circuit decisions interpreting § 1962(c). This ritual incantation for making the circuit conflict that the court below acknowledged disappear, has no such magic power.

1. In terms, § 1962(c) provides for liability for "any person employed by or associated with any enterprise" who "conduct[s] or participate[s] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." As our petition details, eleven circuits have interpreted this language to mean that an entity cannot be both the "enterprise" and the defendant in a claim predicated on subsection 1962(c), and accordingly have adopted the so-called "non-identity" rule. *See* cases cited in Pet. 10 n.5. The court below in contrast has "squarely rejected the non-identity rule." Pet. App. 32a-33a.

2. The phrase "any enterprise" in subsection (c) is not limited or qualified in any respect. There is no basis in that phrase for a distinction between categories of "enterprises." The District of Columbia Circuit case that respondents cite, Opp. 13 n.8, makes explicit what is implicit in the decisions of all of the circuits that have adopted the non-identity rule: "[T]he requirement of non-identity of person and enterprise . . . places some corrupt organizations beyond reach." *Yellow Bus Lines, Inc. v. Drivers Local 639*, 883 F.2d 132, 140 (D.C. Cir. 1989), *aff'd in pertinent part*, 913 F.2d 948 (D.C. Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991).[2]

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[2] This understanding of subsection (c) does *not* mean, as respondents suggest, that an enterprise "could never be held liable under RICO," Opp. 15, for the acts of its officers or agents. The court pointed out in *Yellow Bus* that another prohibitory subsection of RICO, § 1962(a)—which makes it unlawful to invest the financial

3. The decisions respondents have cited from the Second, Fourth, Sixth, Seventh, and Ninth Circuits all hold unequivocally that an entity cannot be both the defendant (the "person") and the "enterprise" under § 1962(c). The analysis adopted in those cases is incompatible with respondents' notion that the phrase "any enterprise" in § 1962(c) applies only to some "enterprises"; and, certainly, none of the cases cited by respondents articulates an "innocent enterprise/guilty enterprise" distinction.[3]

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proceeds of racketeering activities in an enterprise—does not contain the language that is the predicate for the non-identity rule under subsection (c), and therefore an enterprise that has *received the financial proceeds* of the racketeering acts of its agents may be held liable under subsection (a). *See* 883 F.2d at 140. Two of the other cases respondents have cited—*Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 n.5 (4th Cir. 1990); and *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 n.5 (7th Cir.), *cert. denied*, 486 U.S. 1061 (1988)—make the same point. *See also Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 31 (1st Cir. 1986) ("an interpretation that insulates the enterprise from liability under section 1962(c) is not inconsistent with the remedial purposes of RICO . . . [because] a culpable enterprise may be held liable under another section of RICO, § 1962(a)"); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 401-02 (7th Cir. 1984) ("As we read subsection (c), the 'enterprise' and the 'person' must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator."), *aff'd*, 473 U.S. 606 (1985); *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984) (to criticize the non-identity rule as "permit[ting] a corrupt corporation to evade punishment" is misguided because that criticism ignores the distinctions between subsection (c) and subsection (a)).

[3] *See Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985) (cited in Opp. 14 n.8) ("[R]equiring a complaint to distinguish between the enterprise and the person conducting the affairs of that enterprise in the prohibited manner is supported by the plain language of section 1962(c), which clearly envisions two entities . . . Thus, we follow the majority view and hold that under section 1962(c) a corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity."), *cert. denied*, 474 U.S. 1058 (1986); *Davis v. Mutual Life*

4. Contrary to respondents' suggestion, *see* Opp. 13, the Third Circuit's decision in *Brittingham v. Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), does not relax the non-identity rule in that Circuit. The *Brittingham* court observed that "the plain language of the statute provides that the person must be 'employed by or associated with' —*and therefore separate from*—the enterprise." *Id.* at 300 (emphasis added) (quoting *B.F. Hirsch v. Enright Ref. Co.*, 751 F.2d 628, 633 (3d Cir. 1984)). That court added that liability for the alleged enterprise is precluded by the terms of § 1962(c) even though "the enterprise may often benefit from the RICO violations." *Id.*

Indeed, in the portion of the opinion respondents have cited, *Brittingham* holds that the non-identity rule required the dismissal of a § 1962(c) claim even though the complaint, on its face, did not identify the defendant as the "enterprise," because in reality the defendant was not truly distinct from the affected enterprise. *Id.* at 300-03. Respondents are left to build a monument to a rather obscure, and in any event inapplicable, *dictum* in *Brittingham* and, as we show in the margin, respondents do

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*Ins. Co. of New York*, 6 F.3d 367, 377 (6th Cir. 1993) (cited in Opp. 15) ("for purposes of section 1962(c), a corporation cannot be both the 'enterprise' and the 'person' conducting or participating in the affairs of that enterprise"), *cert. denied*, 114 S. Ct. 1298 (1994); *Busby v. Crown Supply, Inc.*, 896 F.2d 823, 840 (4th Cir. 1990) (cited in Opp. 13 n.8) (there is "no occasion now to question [the] correctness" of the rule, "widely followed throughout the circuits" other than the Eleventh, that "the alleged 'person' who violates § 1962(c) must be different from the 'enterprise'"); *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 967 (7th Cir.) (cited in Opp. 13 and 14 n.8) ("Subsection (c) requires that the liable person and the enterprise be separate entities."), *cert. denied*, 486 U.S. 1061 (1988); *Brady v. Dairy Fresh Prods. Co.*, 974 F.2d 1149, 1154-55 (9th Cir. 1992) (cited in Opp. 13 n.8) (employer may be held liable under § 1962(c) only "when the employer [of the wrongdoers] is distinct from the enterprise").

not succeed at that project.[4] Thus, nothing in *Brittingham* suggests that respondents' "innocent enterprise/guilty enterprise" dichotomy has been adopted by the Third Circuit.[5]

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[4] Respondents quote *dictum* in *Brittingham* that "'[i]t is theoretically possible for a corporation to take a separate "active" role in RICO violations also committed by its employees,'" such that "'[t]he corporation would not be the passive victim, but the active perpetrator.'" Opp. 13 (quoting 943 F.2d at 302). The "possibility" to which the court referred is that if a corporation "had a role in the racketeering activity that was *distinct from* the undertakings of those acting on its behalf," 943 F.2d at 302 (emphasis added), it might be permissible under § 1962(c) to describe the "enterprise" as an association-in-fact consisting of the individual corporate agents and the corporation, and in that case the "enterprise" (the association-in-fact) would be distinct from the defendant "person" (the corporation). In *Brittingham* the plaintiffs' effort to present this issue failed because there was no evidence "that the defendant corporations, in contrast to individuals or entities acting on their behalf, took a distinct role in the alleged racketeering activity." *Id.* at 303. Similarly here, plaintiffs have not alleged and could not maintain that the Union played a distinct role in the alleged racketeering activity separate and apart from the acts of the various individuals whom respondents allege were "acting on [the Union's] behalf." *Id. See also Gasoline Sales, Inc. v. Aero Oil Co.*, Civ. No. 93-7555, 1994 WL 593132, at *3 (3d Cir. Mar. 1, 1994); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir. 1993); *Glessner v. Kenny*, 952 F.2d 702, 712 (3d Cir. 1991).

[5] It is worthy of note that a number of circuits have expressly rejected the proposition that allegations of the type respondents advance as to why the Union is not "innocent"—*viz*, that "[the Union's] officials pursue[d] their own interest instead of those of the rank-and-file workers," Opp. 14, and that high-ranking Union officers allegedly "approved of and concealed" the actions of Rich and Phillips after the fact, Opp. 12—can subject an "enterprise" to liability under § 1962(c). In these circuits, the consequence of such facts, if proved, is only that *the individual officers or officials involved* could be held liable under RICO. *See, e.g., Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 33 (1st Cir. 1986) (no "enterprise" liability under § 1962(c) for "acts of high corporate officials"); *Yellow Bus* (no liability of union "enterprise" under § 1962(c) for acts of union trustee and business agent);

B. To be sure, respondents seek to blunt the force of the Eleventh Circuit's "square[] reject[ion of] the non-identity rule" (Pet. App. 32a-33a) by noting that "the Court of Appeals held that the Union could also be liable under . . . § 1962(c) for conducting the affairs of the Fund and/or the affairs of the Fairfield Works through a pattern of racketeering activity." Opp. 16.

But respondents do not—because they cannot—do business with our showing that the assertion of those additional alleged "enterprises" does not justify the Eleventh Circuit's validation of the claims against *the Union* under § 1962(c) in which *the Union* is the alleged affected "enterprise." Pet. 13 n.6. Nor do respondents counter our showing that the allegations naming the Fund and the Fairfield Works as additional "enterprises" do not alter what this case is about at its core: whether the Union may properly be held liable under subsection (c) for the bribetaking by two of its employes that allegedly induced those employees to conduct their Union functions improperly. *Id.*[6]

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*Luthi v. Tonka Corp.*, 815 F.2d 1229 (8th Cir. 1987) (no liability for corporate "enterprise" under § 1962(c) for acts of corporate Treasurer and Chief Financial Officer).

[6] Respondents' invocation of the Union's District 36 as yet another allegedly affected enterprise, *see* Opp. 16, does not change the picture. The court below did not even find that claim worthy of mention. *See* Pet. App. 33a (referring only to the Fund and the Fairfield Works as enterprises distinct from the Union). District 36 is simply an administrative division of the Union—the District has no employees, treasury, or property of its own. It is not a separate legal entity and cannot be treated as a distinct "enterprise" for purposes of § 1962(c). *Cf. Lorenz, supra* note 4 (parent corporation not distinct from subsidiary for purposes of the non-identity rule).

Respondents also refer to the fact that they pleaded their case against the Union as a conspiracy claim rather than as a direct § 1962(c) claim. Opp. 17. But the court of appeals did not treat this distinction as making any difference, *see* Pet. App. 28a-33a (analyzing the case under § 1962(c)), and the court was correct in this respect. *See* Pet. 10 n.3.

C. In the end, then, respondents cannot escape the fact that this case presents a plain conflict on the major recurring RICO issue stated in the first question presented in our petition.

## II. THE PATTERN ISSUE

The court below was unambiguous as to the acts that constituted the "pattern" discerned by the court: those acts consisted of the "illegal request" for pension credits that was made "during the 1983 negotiations," the "establish[ment]" of the pensions in 1984, and the "monthly payment[s] of pension benefits . . . from December 1984 to May 1988." Pet. App. 13a-14a. The Eleventh Circuit held that the negotiation and payment of this single alleged bribe constitutes a RICO pattern. That holding is in square conflict with decisions of five circuits. *See* Pet. 16-18.[7]

Respondents make no effort to show that *what the Eleventh Circuit held* can be reconciled with the decisions of the other circuits. Instead, respondents point to "facts" upon which the court below did *not* rely, in an effort to conjure up a different "pattern" from the one that was sustained by that court.

1. Respondents argue that the alleged pension bribe was offered not only to obtain concessions in the 1983 Fairfield Agreement, but also to induce Phillips and Rich

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[7] Respondents claim that one of the cases we have cited, *Roeder v. Alpha Indus. Inc.*, 814 F.2d 22 (1st Cir. 1987), is "no longer good law" in the First Circuit. Opp. 22. That is not so. Although *Roeder* was decided before this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), the proposition for which we have cited *Roeder* was reaffirmed by the First Circuit in *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720, 723 (1st Cir. 1992) (Breyer, J.), where the court cited *Roeder* in explaining that, "however courts express the point, they have consistently held that a single episode does not constitute a 'pattern,' even if that single episode involves behavior that amounts to several crimes."

to act unfaithfully in the subsequent implementation and enforcement of the Agreement. Opp. 20-21. The court of appeals did *not* accept those allegations, much less rely on them. The district court granted summary judgment to the Union on respondents' allegations of faithless implementation and enforcement of the Fairfield Agreement, both because such a claim had not been pleaded and because there was no evidence to support it. Pet. App. 113a-116a. *See also* Pet. App. 155a (denying leave to amend the complaint). The court of appeals did *not* overturn the dismissal of that claim; the court held only that there was evidence to support respondents' claim that the *negotiation* of the Agreement itself—in which the labor cost concessions at issue here were contained—may have been affected by the alleged pension bribe, *not* that there was evidence to support a claim that Rich and Phillips were improperly influenced in any actions they took with respect to the subsequent *implementation and enforcement* of the Agreement. *See* Pet. App. 16a-26a.

2. Respondents also refer to a pension credit allegedly granted to a Union officer in Indiana. Opp. 12, 20. The court of appeals' holding in this regard was that discovery should be permitted on that matter. Pet. App. 63a. That court did not rely on that alleged episode in finding that plaintiffs had presented sufficient facts to establish a "pattern." Rather, the court held that the components of the single alleged bribe as described by that court at Pet. App. 13a-14a constitute the requisite "pattern." [8]

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[8] Respondents also assert that other Union officials attempted to "cover up" the alleged bribe of Rich and Phillips. Opp. 19. *See also* Opp. 20 (accusing the Union of "obstruction of justice"); Opp. 21 (referring to high Union officials). The court of appeals did not rely on these allegations in finding a pattern, *see* Pet. App. 13a-14a; and even if the allegations were taken at face value and were factored into the analysis, the conflict with other circuits would remain. The alleged "cover-up" would constitute no more than additional wrongdoing incident to a single transaction. *See, e.g., Apparel Art, supra* note 7, 967 F.2d at 723 (no pattern

Thus, notwithstanding respondents' efforts to make this case into something other than what the Eleventh Circuit found it to be, the holding of that court cannot be reconciled with the holdings of five other circuits.

## CONCLUSION

For the foregoing reasons and the reasons stated in the petition, this Court should grant the petition for certiorari.

Respectfully submitted,

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despite "several instances of criminal behavior," including "a cover-up").